

PONDERING THE POLITICIZATION OF INTERCOUNTRY ADOPTION: RUSSIA’S BAN ON AMERICAN “FOREVER FAMILIES”

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This Article explores and assesses the Russian discontinuance of intercountry adoptions to the United States. Part I describes the history of Russia-U.S. adoptions up to and including the 2012 adoption ban. Part II sets forth international laws and principles relevant to Russia’s adoption laws and practices. Part III assesses Russia’s ban on adoptions to America in light of domestic and international law and politics. It is argued that the Adoption Ban undoubtedly represents a largely politically-motivated response to the Magnitsky Act, and in this, it mirrors the politicization of intercountry adoption generally. Russia has the prerogative to strive to meet her children’s best interests domestically, without resorting to intercountry adoption – there is no duty to partake in intercountry adoption – but the American-targeted Adoption Ban is a disproportionate and cumbersome means of achieving this. This subordination of the best interests of the child to state-centric political considerations is problematic, in terms of the short-term interests of Russian children currently in need of families. The Article concludes with recommendations for Russia’s child welfare system moving forward.

INTRODUCTION	2
I. THE HISTORY: THE UNITED STATES, RUSSIA AND INTERCOUNTRY ADOPTION	6
A. <i>The History and Motives of Intercountry Adoption</i>	6
1. The “Child-Rescue” Approach	6
2. A “Market” for Children? Parent-driven Objectives	8
3. Best Interests – of the Child, of the Sender.....	11
B. <i>Russia as a “Sending Country”</i>	15
1. Post-U.S.S.R. Growth	15
2. Russian Voices on Children without Families	18
3. Failed Adoptions and Subsequent Reform.....	22

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C. <i>January 1, 2013: The Adoption Ban</i>	29
II. SETTING THE FRAMEWORK: INTERNATIONAL LAWS OF CHILD WELFARE AND ADOPTION	32
A. <i>The International Approach: Shifting Prioritization of Inter-country Adoption</i>	32
1. Best Interests and Subsidiarity Principles	32
2. The Hague Convention	34
3. Alternative Regulation: Bilateral Treaties	36
B. <i>The Council of Europe Approach: Ambiguity and Caution</i>	38
III. EVALUATING THE BAN: RIGHTS AND DUTIES RELEVANT TO INTERCOUNTRY ADOPTION	40
A. <i>The Politicization of Orphan Welfare – in Russia and Beyond</i>	40
B. <i>A Right to Adoption? Long-term and Short-term Perspectives</i>	45
1. Russia’s Long-term Aim: Ending Inter-country Adoption	45
2. Short-Term Pain: Implications of the Adoption Ban on Russia’s Waiting Children	47
3. Moving Forward, Dual Goals: In-country Care and Inter-country Adoption in the Interim	50
CONCLUSION	53

INTRODUCTION

Between 1995 and 2011, approximately 58,000 Russian children were adopted by American citizens.¹ During this time, over seventy percent of Russian children adopted to families² outside of Russia were adopted by Americans.³ However on December 28, 2012, the movement of Russian infants and children to American families came to an abrupt halt, when the President of Russia signed a federal law “*On Sanctions Against Persons Involved in Violations of Fundamental Human Rights and Freedoms of Citizens of the Russian Federation*” [hereinafter Adoption Ban].⁴ Its measures include sanctions for “those guilty of violating the

¹ *Russian Adoption Statistics*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, http://adoption.state.gov/about_us/statistics.php (last visited Mar. 22, 2012) (listing statistics on Russian adoptions by year since 1999, totaling 45,112); *Russian Adoption Statistics*, ADOPTIONKNOWHOW.COM, <http://www.adoptionknowhow.com/russia/statistics> (last visited Mar. 22, 2013) (showing the number of Russian adoptions to the U.S. from 1995 to 1998 totaling 12,657).

² Adoptive families are commonly called “forever families” in intercountry adoption circles, in reference to the permanent nature of adoption, as compared to transient institutional or foster care. See, e.g., Marlou Russell, *Forever Families*, ADOPTING.ORG, <http://www.adoption.org/adoptions/forever-families-adoption-and-adoptive-parenting.html> (last visited Mar. 25, 2013); *Forever Family*, ENCYCLOPEDIA OF ADOPTION, <http://encyclopedia.adoption.com/entry/forever-family/143/1.html> (last visited Mar. 25, 2013).

³ *International Adoption Statistics: Russia*, AUSTRALIAN INTERCOUNTRY ADOPTION NETWORK, <http://www.aican.org/statistics.php?region=0&type=birth> (last visited Mar. 22, 2012) (showing the number of Russian children adopted by U.S. citizens as compared to other countries).

⁴ О Мерех Воздеиствиия на Лита, Причастныи к Нарушениям Основнополгаиушчихк Прав и Свобод Человека, Прав и Свобод Граждан Россиискои Федератсии [О

fundamental human rights and freedoms” and those “who committed crimes against citizens of Russian Federation in a foreign country.”⁵ Among other provisions, the law prohibits American citizens from adopting Russian children,⁶ thereby bringing to an end, at least for now, the longstanding and generally robust history of Russia-U.S. adoptions. The Russian law is known colloquially as the Dima Yakovlev Bill,⁷ named for a 21-month-old Russian boy adopted to American parents in 2008 and re-named Chase Harrison. Less than six months after his adoption, Chase died of hyperthermia after unintentionally being left in a car by his adoptive father.⁸ In a case that became highly politicized in Russia, Miles Harrison was acquitted of involuntary manslaughter by a Circuit Court judge in Fairfax County, Virginia, in December 2008.⁹ The Russian Ministry of Foreign Affairs shortly thereafter issued a statement on the acquittal, expressing deep anger at the “flagrantly unjust ruling,” and implying a connection between Chase Harrison’s status as a Russian adoptee, and the lack of adequate punishment for the tragedy of his death.¹⁰

Thousands of Russian children have been welcomed into American families over the twenty years of Russia-U.S. adoption history.¹¹ Of those children, Russia claims that twenty have been killed (whether

n Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 272, Item F-3.

⁵ *Id.* arts. 1.1(a), 1.1(b).

⁶ *Id.* art. 4(1).

⁷ Tim Ecott, *Putin Signs Dima Yakovlev Bill*, THE VOICE OF RUSSIA (Dec. 27, 2012), http://ruvr.co.uk/2012_12_27/Putin-says-he-will-sign-Dima-Yakovlev-Bill/ (last visited Mar. 25, 2013).

⁸ Ellen Barry, *Russian Furor over U.S. Adoptions Follows American’s Acquittal in Boy’s Death*, THE NEW YORK TIMES (Jan. 3, 2009), http://www.nytimes.com/2009/01/04/world/europe/04adopt.html?_r=0 (last visited Mar. 25, 2013).

⁹ *Id.* (reporting on Judge Ney’s ruling that although Mr. Harrison’s actions were “plainly negligent”, “callous disregard for human life,” the legal standard for involuntary manslaughter, had not been demonstrated). See, further, Marc Fisher, *Why Was a Father Who Killed Son in Car Acquitted?*, THE WASHINGTON POST (Dec. 19, 2008), http://voices.washingtonpost.com/rawfisher/2008/12/why_was_father_who_killed_son.html (citing the state prosecutor as saying “The fact that [Mr. Harrison] disregarded his duties when those circumstances are likely to cause injury or death, shows callous disregard.”).

¹⁰ *Russian MFA Information and Press Department Commentary on the Acquittal Handed Down by an American Court for Miles Harrison who had been Charged with Involuntary Manslaughter in the Death of his Russian Adoptee Dima Yakovlev*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (Dec. 18, 2008), http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/a8cbc288c5d50da6c3257527002206ae!OpenDocument (“Serious doubts arise as to the legitimacy of the practice of transferring our children for adoption to a country where their rights, primarily the right to life, turn out to be unprotected. And where adequate and ... inevitable punishment is absent for those guilty of such tragedies on, apparently, the sole ground that they are full-fledged citizens, where their adoptees are not.”).

¹¹ Wm. Robert Johnston, *Historical International Adoption Statistics, United States and World*, JOHNSTONS ARCHIVE (May 20, 2012), <http://www.johnstonsarchive.net/policy/adoptionstatsintl.html> (showing the first adoption taking place in 1992).

intentionally or otherwise) by their American adoptive parents over the years, both prior to and following Chase Harrison's death in 2008.¹² In addition to deaths, a number of high-profile cases of abuse have also been reported in the Russian and U.S. media, leading to occasional temporary suspensions of Russia-U.S. adoptions, and negotiations between sender (Russia) and receiver (U.S.) on how best to safeguard Russian adoptees without rendering an already cumbersome and costly process yet more cumbersome and costly.¹³ These negotiations culminated in a bilateral treaty on adoption (hereinafter Russian-American Agreement),¹⁴ which entered into force on November 1st 2012,¹⁵ following approval given by Russia's two parliamentary bodies and President Putin.¹⁶ The Russian-American Agreement addressed Russian concerns over failed adoptions by providing, *inter alia*, for parent screening and training,¹⁷ and mandatory post-adoption reporting to the Russian authorities.¹⁸ However, before there had been any opportunity to meaningfully gauge the success or otherwise of the bilateral treaty in these endeavors, the November 1st Russian-American Agreement was rendered all but obsolete by the December 28th Adoption Ban.¹⁹

This dramatic turnaround should be considered in light of an intervening event. On December 14th 2012, the U.S. Congress passed the Magnitsky Act.²⁰ The Adoption Ban, at first glance a policy response to

¹² *Russia Slams US Child Abuse 'Double Standards'*, RIA NOVOSTI (Dec. 13, 2012, 12:50 PM), <http://en.rian.ru/russia/20121213/178128109.html> (citing Russia's children ombudsman Pavel Astakhov); see also *Russian Adoption Ban Not Linked to Magnitsky Act – Medvedev*, RIA NOVOSTI (Jan. 27, 2013, 19:22 PM), <http://en.rian.ru/russia/20130127/179061848.html>. The number is twenty if the recent death of Max Shatto (*infra*, note 170 and accompanying text) is included in the count.

¹³ See *infra* note 191 and accompanying text.

¹⁴ *Agreement Regarding Cooperation in Adoption of Children, U.S.-Russ., Jul. 13, 2011.*

¹⁵ *United States – Russia Bilateral Adoption Agreement*, U.S. DEP'T OF STATE, (Oct. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/10/199322.htm>.

¹⁶ *Notice: President Putin signs the Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children*, INTERCOUNTRY ADOPTION, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, Jul. 31, 2012, available at http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=russia_7 (noting the procedure for the Agreement to enter into force);

¹⁷ Russian-American Agreement, *supra* note 14, Art. 10(1)(b) (providing the steps prospective adoptive parents shall undergo before being deemed suitable and eligible to adopt).

¹⁸ *Id.*, art. 5(1)(a)-(b) (noting required post-adoption actions including monitoring of adoptee's living conditions and upbringing, to be carried out by authorized agencies).

¹⁹ The Russian-American Agreement provides that it is valid for one year after a party terminates it (art. 17(5)), however as discussed below, Russia has indicated that only adoptions court-approved prior to the ban would proceed (*infra*, note 28 and accompanying text).

²⁰ *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, Pub. L. 112-208, 126 Stat. 1496 (hereinafter Magnitsky Act). See, e.g., Ecott, *supra* note 7 (stating that the bill is 'widely seen inside and outside Russia as retaliation' for the Magnitsky Act); Will Englund, *Russians Say They'll Name Their Magnitsky-retaliation Law After Baby who Died in a Hot Car in Va.*, THE WASHINGTON POST (Dec. 11, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/11/magnitsky-retaliation-man-baby/> (last visited Mar. 25, 2013) (referring to the Adoption Ban bill as retaliation for the Magnitsky Act).

Russia-U.S. adoptions gone wrong, has also been dubbed the “Anti-Magnitsky Law.”²¹ The Magnitsky Act repeals a Cold War trade sanction imposed on Russia in 1974; however this is coupled with the Sergei Magnitsky Rule of Law Accountability Act. Sergei Magnitsky, an auditor working for an American firm in Moscow, accused Russian police and tax officials of involvement in a state-sanctioned \$230 million tax fraud. He was subsequently arrested, and died in custody after being held for almost a year without trial, apparently having been tortured and beaten.²² The Magnitsky Act includes Congressional findings on Sergei Magnitsky’s death,²³ references other unresolved murders, disappearances, torture cases and deaths in custody;²⁴ professes the United States Government’s concern regarding the “deterioration of economic and political freedom inside Russia”;²⁵ and blacklists Russians connected with Magnitsky’s death, or responsible for other human rights violations in Russia.²⁶

Russia has denied a nexus between the Magnitsky Act and the Adoption Ban.²⁷ The Russian Supreme Court has indicated that adoptions that had been court-approved prior to the New Year will be completed, notwithstanding the ban.²⁸ Thousands of demonstrators have turned out for rallies in Russia, both in favor of and opposing the ban.²⁹ The Adoption Ban, the circumstances surrounding its enactment, and the

²¹ Yekaterina Kravtsova, *Duma Stalls on Petition Opposing Anti-Magnitsky Law*, THE MOSCOW TIMES (Jan. 15, 2013), <http://www.themoscowtimes.com/news/article/duma-stalls-on-petition-opposing-anti-magnitsky-law/474002.html> (referring to the Adoption Ban as the “Anti-Magnitsky Law”).

²² Kathy Lally & Will Englund, *Russia Fumes as U.S. Senate Passes Magnitsky Law Aimed at Human Rights*, THE WASHINGTON POST (Dec. 6, 2012), http://www.washingtonpost.com/world/europe/us-passes-magnitsky-bill-aimed-at-russia/2012/12/06/262a5bba-3fd5-11e2-bca3-aadc9b7e29c5_story.html.

²³ Magnitsky Act, *supra* note 20, § 402(a)(7-12).

²⁴ *Id.* § 402(a)(15).

²⁵ *Id.* § 402(b).

²⁶ *Id.* § 404, 405.

²⁷ Maria Young, *Adoption Ban: Children Russia’s Top Priority, Says Envoy*, RIA NOVOSTI (Feb. 14, 2013, 08:00 AM), <http://en.rian.ru/russia/20130214/179458523.html> (citing Ambassador Sergei Kslyak stating that the ban was not a reaction to the Magnitsky Act); *Russian Adoption Ban Not Linked to Magnitsky Act – Medvedev*, *supra* note 12 (citing Prime Minister Dmitry Medvedev as saying that the Adoption Ban is “neither in fact nor in law” linked to the Magnitsky Act).

²⁸ *Alert: Russian Supreme Court Letter on Implementation of Federal Law No. 272-FZ, INTERCOUNTRY ADOPTION, BUREAU OF CONSULAR AFFAIRS, U.S. DEPARTMENT OF State*, Jan. 24, 2013, http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_10.

²⁹ Sonia Elks & Steve Gutterman, *Russian Demonstrators Rally in Support of U.S. Adoption Ban*, REUTERS, (Mar. 2, 2013, 10:02 AM), <http://www.reuters.com/article/2013/03/02/us-russia-adoption-idUSBRE92107D20130302> (reporting on a 12,000-strong pro-ban rally in March 2013, and a ‘tens of thousands’ march protesting the ban, in January 2013). *See, further, Most of Russian Cabinet Against U.S. Adoption Ban – Deputy PM*, RUSSIAN LEGAL INFORMATION AGENCY, Mar. 20, 2013, http://rapsinews.com/legislation_news/20130320/266774715.html (referring to pro- and anti-ban marches, and citing the Deputy Prime Minister’s assertion that the majority of Russian ministers are against the Adoption Ban).

subsequent impassioned debate about Russia-U.S. adoptions past, present and future, is the most recent illustrative example of the intersection of intercountry adoption law and practice with politics.

This Article explores and assesses the Russian discontinuance of intercountry adoptions to the United States. Part I describes the history of Russia-U.S. adoptions up to and including the 2012 adoption ban. Part II sets forth international laws and principles relevant to Russia's adoption laws and practices. Part III assesses Russia's ban on adoptions to America in light of domestic and international law and politics. It is argued that the Adoption Ban undoubtedly represents a largely politically-motivated response to the Magnitsky Act, and in this, it mirrors the politicization of intercountry adoption generally. Russia has the prerogative to strive to meet her children's best interests domestically, without resorting to intercountry adoption – there is no duty to partake in intercountry adoption – but the American-targeted Adoption Ban is a disproportionate and cumbersome means of achieving this. This subordination of the best interests of the child to state-centric political considerations is problematic, in terms of the short-term interests of Russian children currently in need of families. The Article concludes with recommendations for Russia's child welfare system moving forward.

I. THE HISTORY: THE UNITED STATES, RUSSIA AND INTERCOUNTRY ADOPTION

Part I introduces Russia-U.S. intercountry adoption. Specifically, Part I.A traces the history of intercountry adoption generally and the evolution of the driving forces and motives behind its expansion. Part I.B describes Russia's changing role as a sending country in the intercountry adoption picture, including domestic policy debates and examples of politicized failed adoptions, such as that of Chase Harrison. Part I.C focuses on the December 2012 ban, and the accompanying domestic policy measures aimed at improving in-country care for Russian orphans.

A. *The History and Motives of Intercountry Adoption*

1. The “Child-Rescue” Approach

The United States is the largest receiver of intercountry adoptees,³⁰ with 9,319 such adoptions in 2011,³¹ and has historically always been so.³²

³⁰ Publications on Convention of 29 May 1993 on Protection of Children and cooperation in Respect of Intercountry Adoption, Country Statistics, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/upload/wop/adop2010pd05_us.pdf (last visited Mar. 20, 2013).

Intercountry adoption³³ is not a new phenomenon, however the rhetoric surrounding its functions and objectives has shifted throughout its evolution. The earliest manifestation of intercountry adoption was as a humanitarian “child rescue” effort – for example, in the late 19th century, the practice arose of sending abandoned or neglected children from the UK to the British colonies.³⁴ Many of these early international adoptees were seen as needing to be rescued from the stigma of illegitimacy.³⁵ Around the same time, a parallel child rescue movement, focused on child poverty, was taking place in America. Concerned by the numbers of vagrant or impoverished children in New York, many of whom were the children of newly-arrived immigrants, the New York Children’s Aid Society organized the controversial “orphan train movement.”³⁶ Between 100,000 and 200,000 children were put on trains between 1854 and 1929; heading West, the trains would stop at more than 45 states, locating placement families for these “children of unhappy fortune.”³⁷ As a forerunner to the foster care system, the orphan trains were to some a means of furthering the interests of unfortunate children, and to others a source of cheap labor.³⁸

Modern intercountry adoption, “signifying the movement of children from institutional care in impoverished or conflict ravaged countries into the middle-class homes of adopters in western societies,”³⁹ is generally traced to the end of World War II⁴⁰ and, shortly thereafter, the Korean War.⁴¹ The “child rescue” mindset has continued to permeate

³¹ Intercountry Adoption, Bureau of Consular Affairs, U.S. DEPARTMENT OF STATE, http://adoption.state.gov/about_us/statistics.php (last visited Mar. 20, 2013).

³² Johnston, *supra* note 11 (Intercountry Adoptions by Receiving Countries, 1970-2011).

³³ Also known as international adoption or transnational adoption. The terms are used interchangeably herein.

³⁴ KERRY O’HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE* 132 (2009).

³⁵ See, generally, MIKE MILOTTE, *BANISHED BABIES: THE SECRET HISTORY OF IRELAND’S BABY EXPORT BUSINESS* (1997) (on children born to unmarried young women in secret Catholic charity homes, and then sent to the U.S., often without the mother’s approval). See, also, *Julia Gillard Apologies to Australian Mothers for Forced Adoptions*, *THE GUARDIAN* (Mar. 20, 2013, 21:28 PM), <http://www.guardian.co.uk/world/2013/mar/21/julia-gillard-apologises-forced-adoptions> (noting the Australian Prime Minister’s recent national apology to unwed mothers forced by the government to give up their babies for adoption between World War II and the 1970s).

³⁶ *Orphan Trains, THE ADOPTION HISTORY PROJECT*, <http://darkwing.uoregon.edu/~adoption/topics/orphan.html> (last visited Mar. 25, 2013).

³⁷ *The Orphan Trains Program Transcript*, PUBLIC BROADCASTING SERVICE, <http://www.pbs.org/wgbh/amex/orphan/> (last visited Mar. 25, 2013).

³⁸ *Id.*

³⁹ O’HALLORAN, *supra* note 34, 132.

⁴⁰ *Id.*, at 132.

⁴¹ JEAN NELSON ERICHSEN, *INSIDE THE ADOPTION AGENCY* 6 (2007) (relating the story of the first North American international adoption agency, established in response to the institutionalization of Ameri-asian children in Korean orphanages following the Korean War). For a discussion of the qualitative differences between the adoption of European children following World War II, and the American response to Korean War orphans, see Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interest of the Child?*, 10 *TEX. WESLEYAN L. REV.* 343, 346 (2003-2004).

intercountry adoption to date, from “Operation Baby-lift” at the conclusion of the Vietnam War,⁴² to heightened interest in adoption following high-profile exposes on conditions in foreign orphanages.⁴³ More recently, since the 1990s increasing numbers of evangelical church organizations have advocated intercountry adoption as a faith-based response to the needs of “orphans in distress.”⁴⁴

2. A “Market” for Children? Parent-driven Objectives

The rhetoric of “child rescue” remains prevalent in modern intercountry adoption, however over time a number of parent-driven or family-driven objectives and arguments in favor of the practice have also emerged.⁴⁵ Where the initial primary concern of modern international adoption was to provide permanent families for children orphaned by conflict,⁴⁶ adoption is increasingly seen as a mutually beneficial means of providing childless parent/s (whether due to infertility, or an inability or unwillingness to adopt domestically) with children. Thus while there are many older and special needs children in need of family care within receiving countries, including the U.S.,⁴⁷ intercountry adoption has

⁴² Agency for International Development, *Operation Babylift Report, 1975*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/archive/AIDOB.R.htm> (citing a Washington Report on the acceleration of inter-country adoption processing of Vietnamese children due to the emergency war situation). In some cases, adopted children were subsequently returned to their birth-parents, after it emerged they had not in fact been relinquished: ERICHSEN, *supra* note 41, 55.

⁴³ CHRISTINE ADAMEC AND LAURIE MILLER, THE ENCYCLOPEDIA OF ADOPTION 166 (2007) (referring to documentaries on orphanage conditions in Romania in the late 20th century); *see, further*, Steven Mosher, *The Dying Rooms: Chinese Orphanages Adopt a “Zero Population Growth Policy”*, 6 POPULATION RESEARCH INSTITUTE REV. 1 (1996).

⁴⁴ See James 1:27 (THE BIBLE, NEW INTERNATIONAL VERSION): “Religion that God our Father accepts as pure and faultless is this: to look after orphans...in their distress...”. *See, e.g.*, Shaohannah’s Hope (<http://www.showhope.org/AboutUs/WhoWeAre.aspx>) (a non-profit organization founded in 2003 by Christian singer-songwriter Steven Curtis Chapman, that provides financial aid to prospective adoptive parents). *See, further*, KATHRYN JOYCE, THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION xii 2013 (“Across the United States a much wider spectrum of evangelical churches ... had begun to view adoption as a perfect storm of a cause: a way for conservative churches to get involved in poverty and social justice issues that they had ceded years before to liberal denominations, an extension of pro-life politics and a decisive rebuttal to the taunt that Christians should adopt all those extra children they want women to have, and, more quietly, as a window for evangelizing, as Christians get to “bring the mission field home” and pass on the gospel to a new population of children, effectively saving them twice.”).

⁴⁵ See Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L. Q. 677, 680 (1999-2000) (discussing a corresponding paradigm shift in domestic U.S. adoptions, in which the “traditional child welfare agency focus” is often eclipsed by “efforts to satisfy the desires of adults who wish to parent”).

⁴⁶ O’HALLORAN, *supra* note 34, 133.

⁴⁷ *See, generally*, Madelyn Freundlich, *The Future of Adoption for Children in Foster Care: Demographics in a Changing Socio-Political Environment*, THE EVAN B. DONALDSON ADOPTION INSTITUTE (1998), <http://www.adoptioninstitute.org/policy/polfos.html> (estimating that 15-20% of children in U.S. foster care need families through adoption); Jeanne Howard & Stephanie Berzin, *Never Too Old: Achieving Permanency and Sustaining Connections for Older Youth in Foster Care*, THE EVAN B. DONALDSON ADOPTION INSTITUTE (2011),

received increased attention in recent decades as a means of acquiring a younger as opposed to older child; and as an alternative to domestic adoption for individuals or couples whose prospects of adopting in the U.S. are limited due to age, marital status, race or sexual orientation.⁴⁸

Kathleen Ja Sook Bergquist argues that another parent-focused need that has historically underpinned international adoption is the “pseudo-altruistic need to make a social statement about participation in and responsibility to crossing racial boundaries” in a society (the U.S.) trying to redress historic racism.⁴⁹ More pragmatically, Alison Fleisher lists a number of parent-centric advantages to intercountry adoption over domestic adoption, including avoiding the rights of birth mothers and biological fathers, and avoiding disclosure requirements.⁵⁰

The steady increase of international adoption in recent decades is frequently explained by reference to the decreased “availability” of adoptable infants and children in developed countries due to contraception, abortion and the reduced stigmatization of out-of-wedlock parents.⁵¹ A “market” for children has emerged, in which countries with high birthrates and many children in need of care tend to become sending countries, and countries with low birthrates and small numbers of such children becoming receiving countries.⁵² On the “supply” side of the market, there are a multitude of factors behind the high numbers of children in institutional care, and eligible for adoption,⁵³ in sending

http://www.adoptioninstitute.org/publications/2011_07_21_NeverTooOld.pdf, 27 (noting that age is the strongest predictor of whether an adoptable child in the foster system will achieve it). See, further, Erika Lynn Kleiman, *Caring for our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J. L. & SOC. PROBS. 327, 334 (1997).

⁴⁸ Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 AM. ACAD. MATRIMONIAL LAW 181 (1995-1996) (hereinafter Bartholet, *Propriety*), 182 (noting the shortage of babies available for adoption domestically, and the use of international adoption for singles and over-40 couples who may not be able to adopt in the U.S.); Elizabeth Bartholet, *Where do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. OF PENN. L. R. 1163 (1991) (describing historic in-racial adoption placement preferences in the U.S., following opposition in the 1970s from the National Association of Black Social Workers and Native American leaders to transracial domestic adoptions, leading to low availability of adoptable infants and children for Caucasian parents); Alison Fleisher, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 189 (2003-2004) (discussing intercountry adoption as a means of avoiding America's stringent adopter criteria); JOSEPHINE RUGGIERO, *EASTERN EUROPEAN ADOPTION: POLICIES, PRACTICE, AND STRATEGIES FOR CHANGE* 21-22 (2007) (noting the attraction of intercountry adoption to single, elderly and same-sex couples, and the relative speed of international adoptions as compared to domestic adoption).

⁴⁹ Bergquist, *supra* note 41, 346-7; see, further, Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think about Intercountry Adoption*, 30 MICH. J. INT'L LAW. 413, 424 (2009) (postulating that a “reaction against the inhumanity of racist and divisive ideology” may be a related motivating factor).

⁵⁰ Fleisher, *supra* note 48, 190-191.

⁵¹ Bartholet, *Propriety*, *supra* note 48, 181.

⁵² *Id.* (noting that the “world divides into essentially two camps for adoption purposes”).

⁵³ The question of whether an adoptee is, in fact, a “true” orphan or foundling is complicated by the evidence put forward by opponents of intercountry adoption (at least in its current form) that

countries. These include poverty;⁵⁴ insufficient welfare/health-care support for parents, particularly of special-needs children;⁵⁵ political ideology relating to birth rates;⁵⁶ and local cultural norms on adoption.⁵⁷

Parent- or family-driven objectives (to be a parent or to establish a family) do not, of course, necessarily exclude a co-existing child-driven objective of providing a loving home to a child otherwise going without;⁵⁸ however at times the discourse surrounding adoption comes uncomfortably close to casting adoptees as objects or commodities rather than subjects,⁵⁹ something frequently pointed out by opponents of intercountry adoption.⁶⁰ The development of a “market-place” is evident at the adoption agency selection stage of intercountry adoption, when prospective parents must choose from among hundreds of registered

the “market” for international adoptees is itself contributing to the number of apparent adoptees available in sending countries, due to the incentivization of baby stealing practices: *see, generally*, David Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113 (2006) (hereinafter Smolin, *Child Laundering*) (discussed *infra*).

⁵⁴ See O’HALLORAN, *supra* note 34, 137 (using the experience of Korea to illustrate the significance of poverty on the availability of adoptees).

⁵⁵ See, e.g., Kay Johnson et al., *Infant Abandonment and Adoption in China*, 24(3) POPULATION AND DEVELOPMENT REV. 469 (1998), at 504 (noting the financial burden on parents of children with disabilities as a cause behind abandonment in China due, in part, to lack of state support).

⁵⁶ See, e.g., KAY JOHNSON, WANTING A DAUGHTER, NEEDING A SON 57 (2004) (citing a local Chinese government report explicitly acknowledging the connection between abandonment and the one child policy campaign); O’HALLORAN, *supra* note 34, at 137 (reporting a nexus between the Romanian Ceauseacu regime’s policy that families have a minimum of four children each, and abandonment of Romanian children due to an inability to provide for them).

⁵⁷ See, e.g., Bong Joo Lee, *Adoption in Korea: Current Status and Future Prospects*, 16 INT. J. OF SOC. WELFARE 75, 76 (2007) (noting the Confucian emphasis on blood-ties and associated stigma with adoption historically evident in Korea). *C.f.* Johnson et al., *supra* note 55, at 483 (noting that some strains of Confucianism support adoption outside bloodlines to build kinship).

⁵⁸ O’HALLORAN, *supra* note 34, at 135 (noting that the supply/demand nature of adoption does not detract from the compassionate, altruistic motives of prospective adopters).

⁵⁹ Bergquist, *supra* note 41, at 346 (“Motivation for adoption had shifted from the altruistic, finding a home for a parentless child, to the supply and demand economics of finding children for childless couples.”); Andrew Bainham, *International Adoption from Romania – Why the Moratorium Should Not be Ended*, 15 CHILD & FAM. L. Q. 223, 226 (2003) (“Under [Romania’s 1990’s international adoption] regime children were treated as commodities in breach of all international obligations.”). See, e.g., frequent references to the “supply” of children from sending countries as an obvious solution to the high “demand” for [desirable] adoptable children in receiving countries: Bridget Hubing, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, NOTRE DAME J. L. ETHICS & PUB. POL’Y 655, 659 (2001) (“Here, the greatest desire is for healthy, white children; however, the number of preferred children available in the United States does not meet this demand”); Rachel Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 6 (2010) (“Currently in the U.S., the demand for healthy infants to adopt outstrips the supply”); Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L. J. 187, 190 (1994) (referring to the “imbalance of supply and demand for ‘healthy white babies’ in the United States”).

⁶⁰ King, *supra* note 49, at 448. See, also, Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, B. U. INT’L L. J. 179, 254 (noting that “many of the evils attributed to intercountry adopters alone – i.e., seeking a young infant to resemble the adoptive parents – may also be characteristic of in-country adoptive parents.”).

adoption agencies competing to provide services for would-be adoptive parents.⁶¹

3. Best Interests – of the Child, of the Sender

The other facet of the “supply/demand” model of intercountry adoption is the assertion sometimes made that the practice is a rational, burden-relieving solution for sending countries that find themselves overwhelmed in their care of “orphaned”, institutionalized children.⁶² Apart from the fact that this rather naively assumes that the market for adoptees does not itself contribute to an increase in the “baby supply” in sending countries,⁶³ the counter-assertion is that intercountry adoption, rather than beneficial for sending countries, is inherently neocolonialist, or, in other words, a modern form of imperialism. Intercountry adoption invariably involves the movement of children from under-resourced birth parents and birth countries, to comparatively well-off Western families in the first world, which Bergquist argues is strikingly neocolonial.⁶⁴ To others, this movement of children represents the exploitation of “unjust social structures in the sending countries” for the benefit of receivers.⁶⁵ Through this lens, intercountry adoptions are characterized as an “exercise of influence and control by the more powerful nations who are seen as ‘robbing’ Third World countries of their children whilst confirming their inferiority and inadequacy”⁶⁶

In response to “imperialist” objections, adoption advocates argue that ethically and legally the paramount issue is whether international

⁶¹ See, e.g., ERICHSEN, *supra* note 41, 16 (noting the visual aids such as “banners ... of beautiful babies” used by adoption agencies at adoption fairs to attract potential clients).

⁶² Colin Joseph Troy, *Members Only: The Need for Reform in U.S. Intercountry Adoption Policy*, 35 SEATTLE U. L. REV. 1525, 1528 (2011-2012) (arguing that intercountry adoption is mutually beneficial as the “poverty burden” of sending countries are thereby reduced); Lindsay K. Carlberg, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT’L & COMP. L. REV. 119, 125 (2007) (referring to the post-war burden of poverty partially lessened by intercountry adoption between 1953 and 1981).

⁶³ See, generally, Smolin, *Child Laundering*, *supra* note 53 (discussing the incentivization of stealing, kidnapping and buying children by the demand of the intercountry adoption market).

⁶⁴ Bergquist, *supra* note 41, at 349.

⁶⁵ Leslie Doty Hollingsworth, *International Adoption among Families in the United States: Considerations of Social Justice*, 48 SOC. WORK 209, 209 (2003).

⁶⁶ John Triseliotis, *Intercountry Adoption: In Whose Best Interest?*, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 119, 131 (Michael Humphrey & Heather Humphrey eds., 1993), cited in Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT’L & COMP. L. 319, 325-6 (1999-2000). C.f. Saralee Kane, *The Movement of Children for International Adoption: An Epidemiologic Perspective*, 30 THE SOC. SCI. J. 4, 313 (1993) (arguing that the movement of children via international adoption “is not significantly affecting the human resources of most countries of origin”).

adoption serves the best interests of potential adoptees,⁶⁷ regardless of the “neo-colonialist hue”⁶⁸ that the exchange may entail. The “best interests” principle, found, *inter alia*, in the Convention on the Rights of the Child,⁶⁹ the Hague Convention on Intercountry Adoption,⁷⁰ and bilateral adoption treaties, provides that the best interests of the child shall be the primary concern in all decisions, actions and procedures relating to intercountry adoption. An assumption evident in much pro-adoption scholarship is that the “best interests” card self-evidently and invariably requires family care, the pursuit of which trumps concerns relating to imperialism and the related issue of the removal of children from their culture.⁷¹ As David Smolin eloquently puts it, “[f]rom this perspective, ethical or political objections to intercountry adoption lack legitimacy, since they sacrifice the concrete good of children to ideological idols.”⁷² This may often be the case (although “best interests” is necessarily an individualized enquiry),⁷³ but the imperialist argument also sheds light on a related issue of concern in international adoption. Frequently in humanitarian, child-centered discourse on adoption, the “best interests” standard masks an underlying ideological inconsistency – are we saving children from being family-less/institutionalized, or saving them from third-world countries?⁷⁴ The latter is rarely espoused publicly,

⁶⁷ See, e.g., Bartholet, *Propriety*, *supra* note 48, at 184 (arguing that controversies such as the imperialism issue have little to do with the “best interests” of children, despite the supposed paramountcy thereof).

⁶⁸ King, *supra* note 49, 425.

⁶⁹ *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44 Sess., U.N. Doc. A/44/49 (1989), Nov. 20, 1989, 1577 U.N.T.S. 3, entered into force Sept. 2, 1990 [hereinafter UNCRC], art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”); art. 21 (“State Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...”).

⁷⁰ Hague Convention on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption, May 29, 1993, 32 I.L.M. 1134 (entered into force May 1, 1994), [hereinafter Hague Convention], art. 4(b) (providing for adoption to be in the best interests of the child).

⁷¹ See, e.g., Wechsler, *supra* note 59, at 15 (“In contrast to opponents of intercountry adoption, supporters prioritize the children...” (internal quotation omitted)).

⁷² David Smolin, *Inter-country Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 283 (2004).

⁷³ O’HALLORAN gives the example of two (unrelated) Romanian girls, who were subject to international adoption orders but issued proceedings in the Romanian District Court to have the orders revoked as they did not want to leave their native country: *supra* note 34, 162.

⁷⁴ See, e.g., King, *supra* note 49, at 423 (referring to past motives in intercountry adoption of saving children from third-world countries); and at 439-40 (“Invariably, legal scholars describe the opportunities for adoptive children as improved in the United States, and in doing so, imply the superiority of upper- and middle-class parents to poor birth parents. Scholars routinely explain that intercountry adoption offers hope to children of improving their life chances, often of escaping a life “marred by poverty”...”).

lying, as it does, “perilously close to controversial notions of cultural or national superiority,”⁷⁵ but is not absent from adoption rhetoric.⁷⁶

The “best interests” standard is frequently employed on both sides of the intercountry adoption debate. Intercountry adoption – assuming an ideal system that “only includes adoption of those children who would have been in the system (without the family of origin) in any event,”⁷⁷ i.e. does not contribute to baby stealing practices⁷⁸ – is commonly seen as serving a child’s best interests by removing her from institutionalization or foster care, and fulfilling her right to a family⁷⁹ and a nurturing environment.⁸⁰ On the other hand, critics argue that intercountry adoption, contrary to their best interests, unnecessarily denies adoptees their cultural identity and a “sense of group heritage.”⁸¹ A softer cultural argument is that intercountry adoption in some cases unnecessarily under-privileges a child’s right to culture, because in-country care in non-Western family-style social networks is too readily dismissed in favor of out-of-country care.⁸² A related concern is the monetization of adoptions, and the oft-overlooked fact that the “humanitarian” intercountry adoption effort spends tens of thousands of dollars per adoptee “to divide families that could have been kept intact for a hundred dollars or less.”⁸³

⁷⁵ Smolin, *Child Laundering*, *supra* note 53, at 116.

⁷⁶ See, e.g., David Herszenhorn & Erik Eckholm, *Putin Signs Bill that Bars U.S. Adoptions, Upending Families*, THE NEW YORK TIMES (Dec. 27, 2012), http://www.nytimes.com/2012/12/28/world/europe/putin-to-sign-ban-on-us-adoptions-of-russian-children.html?pagewanted=all&_r=0 (referring to criticism that the Adoption Ban will deny Russian children a better standard of living).

⁷⁷ Dillon, *supra* note 60, at 187 and 189 (2003). Dillon refers to the difficulty of identifying those children with certainty as the “adoptability conundrum” (at 187).

⁷⁸ See, generally, Smolin, *Child Laundering*, *supra* note 53.

⁷⁹ See, e.g., Dillon, *supra* note 60, 186-7 (2003).

⁸⁰ Bartholet, *Propriety*, *supra* note 48, at 185 (arguing that the law should afford children “the right to grow up in a nurturing environment”; see, further, Dillon, *supra* note 60, at notes 201-202 (discussing the harms of long-term institutionalization)).

⁸¹ Bartholet, *Propriety*, *supra* note 48, at 202 (noting the culture argument, but arguing that international adoption is an “extraordinarily positive option for the homeless children of the world, compared to all other realistic options”). See, also, Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT’L L. REV. 483, 510 (2003-2004) (noting that “there is little argument from adoption proponents that it is important for intercountry adoptive families to affirm a child’s culture and heritage”).

⁸² King, *supra* note 49, at 466-469 (discussing “non-traditional” caregiving in non-Western countries, and the need to ensure that the intercountry adoption system is not “removing children from what they would describe as family”).

⁸³ Smolin, *Child Laundering*, *supra* note 53, at 188; “It is ethically questionable to spend thousands of dollars (or tens of thousands of dollars) to arrange an intercountry adoption, when aid of less than a thousand dollars would have kept the child with their birth family” (at 127). See, further, Bainham, *supra* note 59, at 226 (referring to “orphans” from Romania whose “birth parents and families all too obviously existed but lacked the resources to remain involved.”); JOHN TRISELIOTIS ET AL., *ADOPTION THEORY, POLICY AND PRACTICE* 181 (1997) (“The legitimacy of in-country or intercountry adoption will continue to be questioned until such time as adequate income maintenance schemes and preventative type services are developed to provide real choice for all birth parents”).

Other common arguments against international adoption are less individualized, and seem to focus more on the best interests of *children* (generally) as opposed to specific cases. For example, some commentators express concern that the ready supply of foreign adoptive parents may discourage in-country initiatives aimed at reducing abandonment and keeping birth families intact.⁸⁴ Jena Martin characterizes this as a pessimistic view of adoption, which does not necessarily deny the current value of the practice, but sees it as a short-term solution which should complement a long-term aim of rendering international adoption obsolete.⁸⁵ She contrasts this to a more optimistic view of adoption, which subscribes to the win/win theory as far as ideal adoption goes, but acknowledges the abuses that an imperfect adoption system commonly entails.⁸⁶ Those abuses are well documented by David Smolin, who argues that the adoption system, at least as it exists in very poor sending countries, “both legitimizes and incentivizes stealing, kidnaping, trafficking and buying children,”⁸⁷ thereby “reduc[ing] the humanitarian rationale for intercountry adoption into a cruel façade....”⁸⁸

It is, of course, overly reductionist to describe the debate over intercountry adoption as one of “for or against,” as most commentators concede both the potential merits of the practice in at least some circumstances, and the undeniable need for reform to move closer to the ideal of corruption-free, child-focused adoption. The complexity of the debate is reflected in the differing prioritizations of out-of-country care vis-à-vis in-country options, evident in commentary and international legal instruments relevant to child welfare. The first adoption-specific UN Declaration, for example, embodies a preference for domestic foster (temporary) or, indeed, other “suitable” domestic placements, over foreign (permanent) adoptions.⁸⁹ The 1989 UN Convention on the Rights

⁸⁴ See Bergquist, *supra* note 41, at 349-50 (arguing that international adoption may allow sending countries to “abdicate responsibility for enacting sociopolitical change to secure the well-being of all children...”; Jonathan Dickens, *The Paradox of Inter-country Adoption: Analysing Romania’s Experience as a Sending Country*, 11 INT’L J. SOC. WELFARE 76, 83\2 (2002) (“as long as the door of inter-country adoption remains open, there are powerful organizational and personal reasons to use it, and these logics decrease the chances of urgent and concert efforts being made to develop in-country alternatives”). C.f. Bartholet, *Propriety*, *supra* note 48, at 198 (arguing that such efforts are “not inconsistent with supporting foreign adoption”, and that foreign adoption may in fact increase awareness within sending countries of the need to address child welfare problems).

⁸⁵ Jena Martin, *The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate*, 13 U. C. DAVIS J. INT’L L. & POL’Y 173, 188 (2006-2007).

⁸⁶ *Id.*, at 187-8.

⁸⁷ Smolin, *Child Laundering*, *supra* note 53, at 115.

⁸⁸ *Id.*, at 116. See, further, Dillon, *supra* note 60, at 188 (acknowledging that the “profitability of intercountry adoption has probably tended in some jurisdictions to bring children into the system who would not otherwise have been there”).

⁸⁹ Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, Annex, U.N. Doc. A/RES/41/85/Annex (Dec. 3, 1986) (hereinafter Declaration of Social and Legal Principles), art. 17.

of the Child takes the same approach, in effect casting international adoption as a measure of last resort.⁹⁰ UNICEF embraces three principles to guide adoption decisions – first, that family-based solutions are preferable to residential placements; secondly, that permanent solutions are preferable to temporary ones; and thirdly, that domestic solutions are preferable to international solutions.⁹¹ Because intercountry adoption cannot fulfill the third condition, UNICEF views it as “subsidiary” to “any foreseeable solution that corresponds to all three.”⁹² The 1993 Hague Convention,⁹³ a multilateral treaty designed to regulate intercountry adoption, is somewhat more “pro-adoption,”⁹⁴ although, as a political necessity,⁹⁵ is ultimately also deferential to the views of national governments as to the merits or otherwise of intercountry adoption over in-country institutional or foster care.⁹⁶

B. Russia as a “Sending Country”

1. Post-U.S.S.R. Growth

While modern international adoptions date to World War II and the Korean War, adoptions from Eastern European countries to America developed more recently.⁹⁷ Prior to its fall in 1991, the Soviet Union was not a significant participant in international adoptions.⁹⁸ In the years following the Soviet Union dissolution, Americans began to adopt Russian children in increasing numbers, with 695 adoptions in 1993 leading to a peak of 5878 adoptions a decade later.⁹⁹ By 1995, China and Russia had taken over from Colombia and Korea as the top countries sending adoptees to the U.S.¹⁰⁰ Russia has consistently ranked in the top

⁹⁰ UNCRC, *supra* note 69, art. 21(b).

⁹¹ *Guidance Note on Intercountry Adoption in the CEE/CIS Baltics Region*, UNICEF (Sep. 2009), http://www.unicef.org/ceecis/UNICEF_ICA_CEE_Guidance_WEB.pdf, at 4.

⁹² *Id.*, at 4.

⁹³ *Supra* note 70.

⁹⁴ Richard Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L. J. 243, 255 (1994) (“A common criticism in the U.S. is that the Convention is not bold enough in encouraging intercountry adoption. However, to say that the Convention merely tilts in favor of intercountry adoption is to understate the importance of the Convention’s gains.”). *See, further, infra* at notes 240 - 248 and accompanying text.

⁹⁵ *Id.*, at 262-4 (discussing the drafting negotiations over whether to move away from the U.N.’s prior stance on intercountry adoption).

⁹⁶ Dillon, *supra* note 77, at 215 (“The Hague Convention leaves a good deal of discretion in the hands of national bureaucracies, and does not clearly address the human rights implications of institutionalization.”).

⁹⁷ RUGGIERO, *supra* note 48, at 3.

⁹⁸ *Id.*, at 5 (noting that two U.S.S.R. children were adopted to America between 1957 and 1963, and an absence of adoptees from the Soviet Union to the U.S. until 1991); Johnston, *supra* note 11 (showing the first adoption from Russia taking place in 1992).

⁹⁹ *Id.*, at 5 (noting annual adoptions from Russia to the U.S. between 1993 and 2005).

¹⁰⁰ HEATHER JACOBSON, CULTURE KEEPING: WHITE MOTHERS, INTERNATIONAL ADOPTION, AND THE NEGOTIATION OF FAMILY DIFFERENCE 22 (2008); *International Adoption Facts, China and*

three sending countries since then.¹⁰¹ Of the Russian children adopted internationally between 1995 and 2012, over 70% have been received by American families.¹⁰² A marked contrast between Russian adoptees and adoptees from other sending countries is their age – between 1993 and 2005, 52% of Russian adoptees to the U.S. were between one and four years old, and 21% were five years old or older.¹⁰³

The increased attention to intercountry adoption generally in the 1970s and 1980s has already been noted.¹⁰⁴ Similarly, Russia came to be viewed as an attractive sending country for adoptive parents in the 1990s for a variety of reasons. Like many sending countries, Russia had relatively relaxed adoption policies at the outset of its intercountry adoption program, as compared to the U.S. In addition to shorter processing times,¹⁰⁵ looser eligibility criteria meant that unmarried persons, same-sex couples¹⁰⁶ and over-60 couples, ineligible to adopt in the U.S., were often successful in adopting from Russia.¹⁰⁷

Dr. Josephine Ruggiero points to two other factors behind the increase in Russian intercountry adoptions in the 1990s – racial congruity,¹⁰⁸ and international concerns over child welfare in post-Soviet Eastern Europe.¹⁰⁹ Racial preference is commonly cited as a factor

Russia have Replaced South Korea as the Primary Countries from which U.S. Citizens Adopt, EVAN B. DONALDSON ADOPTION INST., <http://www.adoptioninstitute.org/FactOverview/international.html> (last visited Apr. 1, 2013) (providing a comparison of top sending countries in 1990 and 2001).

¹⁰¹ Johnston, *supra* note 11 (table of adoptions to the U.S. by sending region/country, 1991-2011); *see, further*, *Top Countries of Origin for U.S. International Adoptions, 2001-2006*, INFOPLEASE, <http://www.infoplease.com/ipa/A0881281.html> (last accessed Apr. 1, 2013) (showing top five sending countries from 2001 – 2006).

¹⁰² *International Adoption Statistics: Russian Federation*, AUSTRALIAN INTERCOUNTRY ADOPTION NETWORK, <http://www.aican.org/statistics.php?region=0&type=birth> (last visited Apr. 1, 2013) (showing the number of Russian children adopted by U.S. citizens as compared to all other receiving countries).

¹⁰³ RUGGIERO, *supra* note 48, at 10-11 (also noting that the majority of adoptees from China and Korea were under the age of one).

¹⁰⁴ *Supra*, at note 51 and accompanying text. Russia, like many sending countries, had relatively relaxed adoption policies at the outset of its intercountry adoption program, as compared to the U.S. In addition to shorter processing times, looser eligibility criteria meant that unmarried persons, same-sex couples and over-60s couples, ineligible to adopt in the U.S., were often successful in adopting from Russia (*id.* at 21-22).

¹⁰⁵ JACOBSON, *supra* note 100, at 39-40, *cited in* Cheryl Allen, *The US-Russian Child Adoption Agreement: An End to Failed Adoptions?*, 35 FORDHAM INT'L L.J. 1690, 1700 (2011-2012) (noting that Russian paperwork processing and adoption procedure times were fairly quick during the early 1990s). *C.f.* Mary Hora, *A Standard of Service that All Families Deserve: The Transformation of Intercountry Adoption between the United States and the Russian Federation*, 40 BRANDEIS L. J. 1017, 1021 (2001-2002) (discussing the difficulties of Russian adoptions due to corruption and “nationalistic rhetoric”).

¹⁰⁶ *C.f.* *Putin Orders Ban on Adoptions by Foreign Same-Sex Couples*, RT.COM (Mar. 28, 2013, 09:53 AM), <http://rt.com/politics/gay-couples-report-foreign-973/> (reporting that Russia plans to prohibit inter-country adoption to same-sex couples in response to France’s approval of same-sex couple adopters in February 2012).

¹⁰⁷ RUGGIERO, *supra* note 48, at 21-22.

¹⁰⁸ *Id.*, at 22 (referring to Russia as a “pipeline to Caucasian children”).

¹⁰⁹ *Id.* at 22 (noting wide publicity of the plight of children in Eastern European orphanages).

drawing prospective adoptive parents to Russia,¹¹⁰ due to the posited preference of adoptive parents for white infants.¹¹¹ Of course, the top sending countries to the U.S. have historically been notably “other” in terms of ethnicity.¹¹² However, racial congruity is arguably a factor behind both the choice to pursue international, as opposed to domestic, adoption,¹¹³ and the choice of sending country.¹¹⁴ To the extent that racial congruity does factor into adoptive parents’ choice of sending country, some commentators have expressed concern that a child’s accessibility to intercountry adoption is at least partially determined by his or her race.¹¹⁵

The aforementioned considerations are somewhat parent-centric, although not exclusively so (an altruistic drive to adopt may lead parents to prioritize efficient programs, and racial congruity is seen by some as an aspect of ensuring a child’s best interests).¹¹⁶ Another main factor

¹¹⁰ See, e.g., Hora, *supra* note 105, at 1021 (noting that “some white Americans have turned to Russia because they prefer to adopt a child that physically resembles them”); Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 374 (2007) (referring to the desire of some prospective adoptive parents to adopt “children whose physical characteristics resemble the family’s racial and cultural background”).

¹¹¹ Twila Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 137 (1998) (stating that “white infants” are the “most sought after children for adoption”). The racial preference aspect of intercountry adoption is related to the arguable commodification of potential adoptees (discussed *supra* note 59 and accompanying text) and feeds into a broader debate on the merits or otherwise of interracial adoption both domestically and internationally – the seminal work is by Elizabeth Bartholet: *Where do Black Children Belong? The Politics of Race Matching in Adoption*, *supra* note 48.

¹¹² Johnston, *supra* note 11 (table of adoptions to the U.S. by sending region/country, 1991-2011) (China, South Korea, Guatemala and Ethiopia are among the top five sending countries to the U.S. for the 1991-2011 period).

¹¹³ Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1418 (2005-2006) (“Another reason many Americans opt to adopt internationally [is] race. Although the majority of children available for international adoption are not white, they are not Black either.”); HAWLEY GRACE FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 12 (2002) (“The reality is that adoption is a last resort for most, and that very few whites want to adopt black children. Most whites prefer healthy white infants, and when they discover that such babies are in short supply they are more likely to adopt children of Colombian, Korean and American Indian ancestry than to adopt African American children.”).

¹¹⁴ Maldonado, *supra* note 113, at 1415 (“The racial hierarchy in the adoption market places white children at the top, African American children at the bottom, and children of other races in between, thereby rendering Asian or Latin American children more desirable to adoptive parents than African American children.”); Bartholet, *Race Matching*, *supra* note 48, at 1167 (“Racial thinking dominates the world of international adoption”). See, further, Peter Selman, *Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004*, 23(2) J. OF POPULATION RESEARCH 183 (2006) (noting that until the 1990s, the number of children adopted from African countries was very low”); but c.f. HOWARD ALTSTEIN & RITA SIMON, *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 3 (1991) (noting that African countries have generally not approved of intercountry adoption of their children).

¹¹⁵ O’HALLORAN, *supra* note 34, at 159.

¹¹⁶ See, e.g., Bartholet, *Where do Black Children Belong?*, *supra* note 48 (citing a 1972 statement by the National Association of Black Social Workers to transracial adoption: “Black children belong, physically, psychologically, and culturally in Black families in order that they

behind Russia's appeal as a sending country, concern over child welfare, is more obviously humanitarian. Since the fall of the Iron Curtain, relinquishment has been a significant social problem in Russia,¹¹⁷ with over 100,000 children entering the State orphanage system annually since 1996.¹¹⁸ Stories and images of neglected and abused children in overcrowded Russian orphanages became commonplace in the Western media,¹¹⁹ at a time when increasing numbers of Americans were looking to adopt internationally.

2. Russian Voices on Children without Families

The problem of children without parental care is a significant challenge for the Russian Federation. There were over 700,000 such children in Russia as of 2009,¹²⁰ an estimated 2.79% of the total child population.¹²¹ Children without parental care are often designated orphans (especially in adoption discourse), but it is estimated that between 80% and 95% are "social orphans", meaning they have at least one living parent who has

receive the total sense of themselves and develop a sound projection of their future"); *see, further*, Fleisher, *supra* note 48, at 179-180.

¹¹⁷ *See, generally*, CLEMENTINE K. FUJIMURA ET AL., RUSSIA'S ABANDONED CHILDREN: AN INTIMATE UNDERSTANDING (2005).

¹¹⁸ Allen, *supra* note 105, at 1701, citing FUJIMURA ET AL., *id.* *See, further, infra*, notes 120 to 130 and accompanying text. By way of comparison, around 250,000 children enter the U.S. foster care system annually, of which more than half remain in the system (*Meet the Children*, ADOPT U.S. KIDS, <http://www.adoptuskids.org/meet-the-children> (last accessed Jun. 6, 2013)). Fifteen percent of children in U.S. foster care live in institutions and group homes (*Facts about Foster Care, CHILDREN'S RIGHTS*, <http://childrensrights.org/issues-resources/foster-care/facts-about-foster-care/> (last accessed Jun. 6, 2013)).

¹¹⁹ RUGGIERO, *supra* note 48, at 22 (referring to "stark images" in the media of abandoned children and the "bleak, institutional settings" in which many were growing up). *See, e.g.*, Kathleen Hunt, *Abandoned to the State: Cruelty and Neglect in Russian Orphanages*, HUMAN RIGHTS WATCH, Dec. 1998, available at <http://www.hrw.org/legacy/reports/reports98/russia2/>; Melissa Akin, *New Study Lists Abuses in Russia's Orphanages*, THE MOSCOW TIMES (Dec. 17, 1998), <http://www.themoscowtimes.com/news/article/new-study-lists-abuses-in-russias-orphanages/282152.html>; Mareike Aden, *U.S. Couple Battles Russian Adoption Ban*, DEUTSCHE WELLE (Feb. 18, 2013), <http://www.dw.de/us-couple-battles-russian-adoption-ban/a-16596137> ("The biggest wave of adoption took place during the 1990s, when pictures of starving children in overcrowded Russian orphanages shocked people in the West.").

¹²⁰ UNICEF *Annual Report for Russian Federation 2010*, UNICEF, http://www.unicef.org/about/annualreport/files/Russian_Federation_COAR_2010.pdf, (hereinafter UNICEF 2010 Report), at 2 (referring to the 130,000 children who live in Russian state institutions as 18% of the population of children without parental care); *see, further, What's the Matter Here? – Russian Orphans & American Adoption*, THE ACCIDENTAL RUSSOPHILE (Mar. 2, 2006), <http://accidentalrussophile.blogspot.com/2006/03/whats-matter-here-russian-orphans.html> (estimating the number of orphans in Russia in 2005 as 700,000). The number may be conservative, as it fails to take into account homeless children living on the streets: *Situation Analysis of Children in the Russian Federation 2007*, UNICEF, http://www.unicef.org/sitan/files/ru_en_situation-analysis_170907.pdf (hereinafter UNICEF 2007 Report), at 71-72 (noting the difficulty of ascertaining the precise number of street children, but citing Ministry of Interior statistics that in 2004, around 90,000 children had either left home or were missing).

¹²¹ UNICEF 2010 Report, *supra* note 120.

voluntarily or involuntarily relinquished them to the state.¹²² A number of factors account for this, including economic hardship associated with Russia's transition to federation,¹²³ alcohol abuse,¹²⁴ and a lack of state support particularly for parents of children with disabilities.¹²⁵ Further, Russia's guardianship system is "mainly punitive", more focused on deprivation of parental rights than assisting parents to keep or regain custody of their children.¹²⁶ Although the annual number of children deprived of parental care is declining,¹²⁷ a significant number of children are removed from their parents by court order due to abuse or neglect annually, and only a small number of such children are returned to their parents within a year of removal.¹²⁸

¹²² Max Fisher, *The Real Reason Russia wants to Ban Adoptions by 'Dangerous' American Families*, THE WASHINGTON POST (Dec. 28, 2012) (stating that 80% of Russian orphans are "social orphans"); *Statistical Snapshots: Russia's Children at Risk*, RUSSIAN CHILDREN'S WELFARE SOCIETY, http://www.rcws.org/aboutus_statistics.htm (citing UNICEF's estimate that 95% of Russian "orphans" are "social orphans, meaning that they have at least one living parent who has given them up to the state"); Michael Schwartz, *An Experiment in Orphan Care in Russia*, THE NEW YORK TIMES (Oct. 1, 2008), http://www.nytimes.com/2008/10/01/world/europe/01iht-russia.4.16620179.html?pagewanted=all&_r=2& (stating that the majority of classified orphans in Russia have been "abandoned or taken from parents because of neglect or abuse").

¹²³ David Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 467 (2009-2010) (hereinafter Smolin, *The Future and Past of Intercountry Adoption*) (noting that the economic collapse which followed the fall of communism "aggravated" the problem of abandonment); UNICEF 2007 Report, *supra* note 120, at 70; *see, further*, President Vladimir Putin, *Annual Address to the Federal Assembly* (May 10, 2006, Marble Hall, the Kremlin, Moscow), available at http://archive.kremlin.ru/eng/speeches/2006/05/10/1823_type70029type82912_105566.shtml (last accessed Apr. 4, 2013) (noting the ongoing difficulties faced by families in feeding their children).

¹²⁴ UNICEF 2007 Report, *supra* note 120, at 78 (noting references to alcohol abuse as a significant factor behind abandonment in studies of the issue); Kate Pickert, *Russian Kids in America: When the Adopted Can't Adapt*, TIME MAGAZINE (Jun. 28, 2010), available at <http://www.time.com/time/magazine/article/0,9171,1997439-1,00.html> (noting that Russian orphans are more likely to have fetal alcohol syndrome than orphans from other sending countries).

¹²⁵ UNICEF 2007 report, *supra* note 120, at 78 (noting the "ease with which a mother may abandon at birth" and the lack of economic support for parents of children with disabilities or special medical needs); Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 123, at 467 (noting the significant incidence of abandonment of disabled children).

¹²⁶ Svetlana Smetanina, *Protecting Russia's Orphans*, RUSSIA BEYOND THE HEADLINES (Apr. 13, 2011), http://rbth.ru/articles/2011/04/13/protecting_russias_orphans_12692.html (noting the punitive nature of the Russian guardianship system, as contrasted with a regional approach in Tyumen, Russia, which is more "positive" – "Most importantly, there is no talk of depriving these parents of their parental rights and putting their children in orphanages."); *see, further*, Boris Altshuler, *Russia and the UN Committee on the Rights of the Child*, RIGHT OF CHILD (Regional NGO for Protection of Children's Rights), Oct. 6 2010, available at <http://pravorebenka.narod.ru/eng/> (arguing that preventive systems are not developed in Russia).

¹²⁷ Boris Altshuler, *Russian NGOs' "Alternative Report – 2013" to the Committee on the Rights of the Child*, Apr. 3, 2013, available at <http://pravorebenka.narod.ru/eng/>, at 12 (noting a decline from 127,000 in 2006 to 83,000 in 2012). *See, further*, Family Code of the Russian Federation, SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1996, No. 11, Item 939 (hereinafter Russian Family Code), art. 69 (providing that children can be removed from their parents if, inter alia, the parents suffer from chronic alcoholism or drug addiction); UNICEF 2007 Report, *supra* note 120, at 79-80 (calling for a reduction in judicial termination of parental rights).

¹²⁸ *Id.* (noting a figure of less than 10%).

Faced with very large numbers of children needing state care, Russia traditionally prioritized institutional care over foster care;¹²⁹ domestic adoption was likewise underdeveloped.¹³⁰ However in the 2000s, partly in response to criticism in the 1990s of the quality of care in its institutions,¹³¹ domestic Russian policy began to increasingly acknowledge the problem of social abandonment,¹³² and to accept and promote domestic foster care and adoption programs as alternatives to institutionalization.¹³³ For example, federal programs were put in place providing financial incentives for foster parents,¹³⁴ and the Russian Family Code was amended to expressly enshrine a preference for family-style care (such as adoption and foster care) over institutionalization.¹³⁵ Today, the majority of Russia's designated orphans are cared for in family settings,¹³⁶ but there are still a large number – 100,000 as of

¹²⁹ Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 123, at 466 (noting the government's failure to "develop appropriate alternatives, such as foster care or other family-based care, for children who could not remain with their families"); UNICEF 2007 Report, *supra* note 120, at 79 (referring to the "paradigm of [the Russian] child welfare system" as involving a "relatively large network of institutions for childcare and long-term residence").

¹³⁰ Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 123, at 466; *see, further*, Vladimir Putin's 2006 Address to the Federal Assembly, *supra* note 123 (calling for increased domestic adoptions); Boris Altshuler, *Russian Domestic Adoption: Hopes for Future Development*, RIGHT OF CHILD (Oct. 2002), available at <http://pravorebenka.narod.ru/eng/index.htm> (arguing that the Russian government has not effectively advocated family placement of orphans over institutionalization).

¹³¹ *See, e.g.*, Hunt, *supra* note 119 (a widely publicized 1998 Human Rights Watch report on the conditions in Russian orphanages); *Russian Orphanages Struggle amid Economic Crisis*, CNN (Dec. 28, 1998), <http://www.cnn.com/WORLD/europe/9812/28/russia.orphanages/index.html?s=PM:WORLD>.

¹³² UNICEF 2007 Report, *supra* note 120, at 70 (noting the government's 2002 pledge to fight the "social abandonment of children" and related policy measures).

¹³³ UNICEF 2007 Report, *supra* note 120, at 80-81. *See, e.g.*, Vladimir Putin's 2006 Address to the Federal Assembly, *supra* note 123 (calling for financial incentives for placing orphans in "family care"); *Excerpts from Transcript of Meeting with the Cabinet, February 5, 2007*, PRESIDENT OF RUSSIA OFFICIAL WEBSITE, http://archive.kremlin.ru/eng/text/speeches/2007/02/05/1855_type82913type82917_117804.shtml (last accessed Apr. 2, 2013) (noting the 2007 federal "Children and the Family" program aiming (inter alia) to "increase the number of orphaned children living in families rather than in state children's homes"); Vladimir Putin, *Speech at the Opening Ceremony for the Year of the Family in Russia*, Dec. 24, 2008, The Kremlin, Moscow, available at http://archive.kremlin.ru/eng/text/speeches/2007/12/24/1039_type82912type84779_155422.shtml (referring to legislation aimed at improving the foster care and guardianship process, and stating that the state cannot replace the family); *Life in the Orphanage*, RUSSIAN ORPHANAGE OPPORTUNITY FUND (Nov. 14, 2011), http://www.roofnet.org/orphanage_life (last accessed Apr. 2, 2013) (noting that adoption and foster care system initiatives are "steadily gaining acceptance in Russia"); Schwirtz, *supra* note 122 (reporting on an experimental orphan community near Moscow, established as a "model of reform" for Russia's institution-focused welfare system).

¹³⁴ UNICEF 2007 Report, *supra* note 120, at 81 (noting increased financial support for foster families following President Putin's 2006 call for enhanced aid for children without parents). *See, generally*, Family Care for Orphans website, MINISTRY OF EDUCATION AND SCIENCE, <http://www.usynovite.ru/> (last accessed Apr. 3, 2013) (providing support and information for current and prospective foster and adoptive families within Russia).

¹³⁵ Russian Family Code, *supra* note 127, art. 123(1).

¹³⁶ Family Care for Orphans website, MINISTRY OF EDUCATION AND SCIENCE, *Statistics – 2011*, <http://www.usynovite.ru/statistics/2011/1/> (reporting that of 82,117 children reported to be

2012¹³⁷ – resident in institutions.¹³⁸ Additionally, despite some state measures aimed at reducing the incidence of abandonment and involuntary deprivation of parental rights, UNICEF reported in 2010 that “the inflow of children into state care has not declined,”¹³⁹ meaning that there is a constant turnover of parentless children and social orphans into and out of the system.

In this context, intercountry adoption is one aspect of Russia’s gradual push away from institutionalization and towards family care. However, intercountry adoption as a partial solution to Russia’s child welfare problems is controversial and divisive. Nationalist sentiment speaks against the care of Russian children by foreigners as denigrating to Russian pride.¹⁴⁰ Some have gone so far as to analogize it to “cultural genocide.”¹⁴¹ Adding fuel to popular anti-adoption feelings are occasional rumors of corruption and of Westerners “buying” Russian children.¹⁴² Russia’s Children’s Ombudsman, Pavel Astakhov, is a particularly vocal opponent of intercountry adoption¹⁴³ who has

without family care in 2011, 67,500 were transferred to family-based care including through adoption, paid and unpaid foster placements, and trusteeships). *See, further*, UNICEF 2010 Report, *supra* note 120 (noting that of children without parental care, the majority live in family settings); UNICEF 2007 Report, *supra* note 120, at 70 (noting that 74% of orphans had been placed in family placements as of 2004).

¹³⁷ *Most Orphanages to be Closed in Russia, Children to be Adopted*, ITAR-TASS NEWS AGENCY (Feb. 28, 2012, 11:31 AM), <http://www.itar-tass.com/en/c154/353743.html>.

¹³⁸ Schwartz, *supra* note 122 (reporting that as of 2008, over 200,000 “orphans” lived in institutions in Russia, the quality of which varied widely; noting recent abuse scandals at a Yekaterinburg hospital); UNICEF 2010 Report, *supra* note 120 (stating that 130,000 “orphans” live in state institutions); *Statistical Snapshots: Russia’s Children at Risk*, *supra* note 122 (reporting that the number of orphanages has increased by 100% in the last decade, with a total of 2,176 orphanages in Russia today); UNICEF 2007 Report, *supra* note 120, at 70–71 (noting that institutional care grew by 4.8% between 2000 and 2004). *See, further*, Altshuler, *supra* note **Error! Bookmark not defined.** (arguing that there are strong anti-reform interest groups in Russia who are financially interested in preserving the traditional orphan-producing structure).

¹³⁹ UNICEF 2010 Report, *supra* note 120. *C.f.* Altshuler, *Alternative Report – 2013*, *supra* note 128 (noting a decline in the number of children in institutions from 2003 to 2009, but attributing this to the decline of Russia’s child population generally).

¹⁴⁰ Hora, *supra* note 105, at 1022 (“The Russians are deeply sensitive to any suggestions that they cannot look after their own needy children.”); Donovan Steltzner, *Intercountry Adoption: Toward a Regime that Recognizes the “Best Interests” of Adoptive Parents*, 35 *CASE W. RES. J. INT’L L.* 113, 125 (2003); Michael Mainville, *Prospective Parents Flock to Russia to Adopt, but some Balk at Westerns ‘Buying’ Children*, *THE NEW YORK SUN* (Nov. 16, 2004), <http://www.nysun.com/foreign/prospective-parents-flock-to-russia-to-adopt-but/4877/> (referring to the “deep embarrassment many Russians feel that the country is exporting its children”).

¹⁴¹ Steltzner, *supra* note 140, at 125.

¹⁴² Mainville, *supra* note 140 (noting, in 2004, of politicians making such claims – “It’s a dirty country that sells its children” (citing a Communist Party deputy)); Hora, *supra* note 105, at 1022 (“Media accounts of international adoption in Russia and the United States are permeated with suspicion and mistrust.”); Joan Oleck, *From Russia – With Red Tape*, *BLOOMBERG BUSINESSWEEK* (May 18, 1998) (noting “wild rumors such as one about Americans selling adopted babies’ organs, have touched off a backlash against foreigners”).

¹⁴³ *See, generally*, David Herszenhorn, *Russian Who Led U.S. Adoption Ban has Flair for Celebrity and Controversy*, *THE NEW YORK TIMES* (Feb. 22, 2013),

repeatedly voiced a nationalist-sounding view that “Russia’s children” should be kept in Russia,¹⁴⁴ and in 2011 addressed the Supreme Court with a request to introduce a moratorium on foreign adoptions.¹⁴⁵ Prime Minister Dmitry Medvedev, on the other hand, has expressed the view that foreign adoptions are not of themselves problematic, given the extent of Russia’s child welfare problems.¹⁴⁶ The Russian Family Code provides that the adoption of children by foreigners shall only occur when it is impossible to bring a child into a Russian family,¹⁴⁷ thus apparently prioritizing in-country (temporary) foster care over intercountry adoption.

3. Failed Adoptions and Subsequent Reform

The international adoption regime has been beset, over the years, by various scandals and controversies, primarily relating to baby stealing, kidnaping and buying.¹⁴⁸ Russia has remained fairly free of the taint of these scandals, it being widely accepted that Russian adoptees are in fact “legitimately eligible for adoption.”¹⁴⁹ However, while thousands of Russian adoptions have by all reports been successful, a smaller number of well-publicized adoptions have ended horrifically. Russia claims that at least twenty Russian children have been killed, whether intentionally or otherwise, by their American parents over the years.¹⁵⁰ Further, as

<http://www.nytimes.com/2013/02/23/world/europe/pavel-astakhov-the-man-behind-us-adoption-ban.html?pagewanted=all>.

¹⁴⁴ *Quotes of the Day*, TIME WORLD (Apr. 16, 2010), <http://www.time.com/time/quotes/0,26174,1982523,00.html> (“We must, as much as possible, keep our children in our country.”).

¹⁴⁵ Maria Domnitskaya, *Pavel Astakhov: Russia with No Orphans – Such It Will Be*, THE VOICE OF RUSSIA (15:43 PM, Dec. 29, 2011), <http://english.ruvr.ru/2011/12/29/63119494/>.

¹⁴⁶ *Working Meeting with Pavel Astakhov and Yury Chaika*, PRESIDENT OF RUSSIA WEBSITE (Dec. 3, 2011), available at <http://eng.kremlin.ru/news/3160>.

¹⁴⁷ Russian Family Code, *supra* note 127, § 124(4) (“The adoption of children by foreign citizens or by stateless persons shall be admitted only in cases when it is impossible to give these children for upbringing into the families of citizens of the Russian Federation, who permanently reside on the territory of the Russian Federation, or for adoption to the children’s relatives, regardless of the citizenship or the place of residence of these relatives.”).

¹⁴⁸ *See, generally*, Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 123, describing the incidence of child buying, stealing, kidnaping and trafficking within the international adoption system, with particular attention to Cambodia, India and Guatemala.

¹⁴⁹ *Id.*, at 125 (dividing sending nations into three groups – those with consistently clean reputations, such as China and South Korea; those such as Russia with few problems relating to child laundering, but ongoing issues with bribery; and those with significant child laundering issues). *See, further*, Hora, *supra* note 105, at 1021 (noting, as of 2002, issues with bribery and corruption in Russian intercountry adoption). *But see, also*, UNICEF 2007 Report, *supra* note 120, 74 (noting general human trafficking problems in Russia, as an “origin, transit and destination country for women, men and children trafficked for sexual and labor exploitation”).

¹⁵⁰ *Russia Slams US Child Abuse ‘Double Standards’*, RIA NOVOSTI (Dec. 13, 2012, 12:50 PM), <http://en.rian.ru/russia/20121213/178128109.html> (citing Russia’s children ombudsman Pavel Astakhov); Andrew Hiller, *Russia Awaits Investigation into Adopted Boy’s “Shocking” Death in Texas*, VOICE OF RUSSIA (Feb. 18, 2013),

David Smolin points out, these dead children “represent the extremes of a much broader phenomenon of post-institutionalized Russian children doing very poorly in their new environments.”¹⁵¹ A much larger number of Russian adoption placements to the U.S. have failed, with children being re-institutionalized, hospitalized, surrendered to the U.S. foster care system or privately re-adopted.¹⁵²

Such failed adoptions have been well-documented elsewhere;¹⁵³ a few examples will serve to illustrate the variety of cases that have sparked concern and outrage in both sending country and receiving country:

- In 1996, David Polreis, Jr. died at the age of two, six months after his adoption by a Colorado family. His adoptive mother was sentenced to twenty-two years in prison for child abuse resulting in David’s death. Her defense, that David suffered from Reactive Attachment Disorder which caused him to inflict pain on himself, was refuted by evidence that his mother had routinely beat him. The sentencing judge acknowledged David’s illness, but commented that society “cannot accept any less protection for its troubled children than for those who develop normally.”¹⁵⁴
- In 2001, Viktor Matthey died at the age of seven, ten months after his adoption by a New Jersey family, of cardiac arrest due to hypothermia, after being “imprisoned” in an unheated and damp pump room by his adoptive parents.¹⁵⁵ He also suffered malnutrition and physical beatings.¹⁵⁶ His parents’ defense was that Viktor “self-injured.”¹⁵⁷ They were

http://voicerrussia.com/radio_broadcast/70924886/105272181/ (transcript of interview with Konstantin Dolgov, special representative for human rights in the Russian Foreign Ministry: “If they find that the boy [Max Shatto] was killed by his American parents, it’ll be number twenty!” [Russian adoptees killed in America]); see also *Russian Adoption Ban Not Linked to Magnitsky Act – Medvedev*, *supra* note 12. According to Moscow, between 1991 and 2005, 1220 children have died while in the care of Russian adoptive parents (Anna Arutunyan, *Who Supports the Ban – and Why*, THE MOSCOW NEWS (Dec. 24, 2012, 21:52 PM) – these equally tragic incidents are beyond the scope of this paper.

¹⁵¹ Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 123, at 474.

¹⁵² *Id.*, at 474 (noting the large number of Russian adoptees in the U.S. who have been “institutionalized, hospitalized, placed into the United States foster care system, or otherwise have failed to adapt to their adoptive placements”); Pickert, *supra* note 124.

¹⁵³ See, especially, Allen, *supra* note 105; Pickert, *supra* note 124; Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 123.

¹⁵⁴ Katharine Q. Seelye, *Woman Sentenced to 22 Years in Death of Adopted Son*, THE NEW YORK TIMES (Sep. 23, 1997).

¹⁵⁵ Matthew Reilly & Saed Hindash, *The Short Life of Viktor Matthey*, NEWARK STAR-LEDGER (Oct. 28, 2001) (available at <http://dartcenter.org/content/short-life-viktor-matthey#.UVzYvJNJM1I>).

¹⁵⁶ Elizabeth Evans, *Adopted Child’s Death a Familiar Tragedy*, THE YORK DISPATCH (Aug. 3, 2010), http://www.yorkdispatch.com/local/ci_14633756.

¹⁵⁷ *Id.*

sentenced to ten year prison terms for child abuse, and four year sentences after pleading guilty to reckless manslaughter.¹⁵⁸

- In 2003, Jessica Hagmann died at the age of two, from smothering. Her mother, who claimed she accidentally smothered Jessica while trying to calm a tantrum, was sentenced to probation and two suspended terms.¹⁵⁹
- In 2003, Masha Allen was rescued from her adopter, Matthew Mancuso, who had adopted Masha at the age of four and had been raping and sexually exploiting her via the Internet for nearly five years.¹⁶⁰ Mancuso, a divorced father who (it was later discovered) had molested his own daughter,¹⁶¹ had found Masha through an American adoption agency after requesting a “5- or 6-year old Caucasian girl.”¹⁶²
- In 2005, Nina Victoria Hilt died at the age of two. Her adoptive mother admitted punching and kicking the girl to death because “she was not behaving and not listening and just crying.”¹⁶³
- In 2009, Nathaniel Craver died at the age of seven, from a severe head injury. His parents said he had serious mental and emotional problems that caused him to repeatedly injure himself. They were acquitted of murder but convicted for involuntary manslaughter, and released on account of time already served.¹⁶⁴
- In 2010, Justin Hansen, aged seven, was sent back to Moscow, alone, with a letter from his adoptive mother

¹⁵⁸ Laura Craven, *Mattheys Sentenced to Four Years for Viktor's Death*, NJ.COM (May 10, 2007), http://blog.nj.com/ledgerupdates/2007/05/mattheys_sentenced_to_4_years.html.

¹⁵⁹ Russell Working, *Adoptee Deaths Rare, Experts Say*, CHICAGO TRIBUNE NEWS (May 21, 2004), http://articles.chicagotribune.com/2004-05-21/news/0405210350_1_adoptive-families-adam-pertman-emotional-disorders/2.

¹⁶⁰ *Heroic Young Girl Tells of her Child Porn Ordeal*, ABC NEWS (Dec. 1, 2005), <http://abcnews.go.com/Primetime/LegalCenter/story?id=1364110#UVzjjJNJM11>.

¹⁶¹ David Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 22 (2007); *Sexual Exploitation of Children Over the Internet: Follow-up Issues to the Masha Allen Adoption: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 109th Cong. 106-13 (2006), available at <http://poundpuplegacy.org/files/SexualExploitationHearing.txt>.

¹⁶² *Heroic Young Girl Tells of her Child Porn Ordeal*, *supra* note 160.

¹⁶³ Theresa Vargas, *Mother Admits Killing Daughter*, THE WASHINGTON POST (Mar. 2, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102380.html>.

¹⁶⁴ David Herszenhorn, *Russia Attacks Sentence of Adoptee's Parents*, THE NEW YORK TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/world/europe/russia-angry-at-penalty-against-dead-adopted-boys-parents.html?_r=0; Rick Lee, *Cravers Sentenced in Death of Adopted Russian Son*, YORK DAILY RECORD (Nov. 21, 2011), http://www.ydr.com/ci_19365008.

stating she no longer wished to parent him,¹⁶⁵ and that he had severe psychological problems. Ms. Hansen claimed that the Russian orphanage authorities had misled her regarding the child's "mental stability and other issues."¹⁶⁶ Ms. Hansen was subsequently ordered to pay \$150,000 in child support for Justin (now Artyom), who now lives in a Russian group home.¹⁶⁷

- In 2012, Daniel Sweeney, age nine, ran away from his adoptive parents, Matthew and Amy Sweeney, six years after his adoption. Authorities found signs of severe beatings on his body.¹⁶⁸ His parents were indicted in January 2013.¹⁶⁹
- In 2013, Max Shatto, age three, died from multiple injuries.¹⁷⁰ The Russian Children's Ombudsman, Pavel Astakhov, accused Max's parents of beating him to death.¹⁷¹ A Texas jury ruled that the death was accidental, that Maxim's pre-existing bruises were self-inflicted, and that there was insufficient evidence to bring negligence charges.¹⁷²

Some failed adoptions, such as the Masha Allen case, clearly represent gross cruelty and deviance on the part of adoptive parents.

¹⁶⁵ Will Stewart, *Fury as U.S. Woman Adopts Russian Boy, 7, Then Sends Him Back Alone with Note Saying: "I Don't Want Him Anymore"*, DAILY MAIL (U.K.), Apr. 9, 2010, <http://www.dailymail.co.uk/news/article-1264744/American-sends-adopted-Russian-boy-behavioural-problems.html> (including a picture of the accompanying letter).

¹⁶⁶ *Id.* See, further, Damien Cave, *In Tenn., Reminders of a Boy Returned to Russia*, THE NEW YORK TIMES, Apr. 10, 2010, <http://www.nytimes.com/2010/04/11/us/11adopt.html> (noting that the Hansens have "portrayed themselves as victims", claiming that Justin had threatened to kill family members).

¹⁶⁷ *Tennessee Woman Appeals Court Order to Pay \$1,000-a-month Child Support for Adopted Son She Sent BACK to Russia*, DAILY MAIL (Aug. 17, 2012), <http://www.dailymail.co.uk/news/article-2189797/Tennessee-woman-appeals-court-ordered-child-support-adopted-boy-sent-BACK-Russia.html> (noting that the adoption agency who processed Justin's adoption brought the action "to deter others from doing anything similar" and to send a message to Russia that accountability systems are in place). Note that the (subsequent) Russian-American Agreement, discussed *infra*, expressly provides that an adoptive parent is obligated to "bear full responsibility for the care of the child and for his or her upbringing" (*supra* note 14, §11(1)).

¹⁶⁸ Justin Karp et al., *Matthew and Amy Sweeney Arrested, Accused of Repeated Abuse of Son*, ABC NEWS (Jul. 19, 2012), <http://www.wjla.com/articles/2012/07/matthew-and-amy-sweeney-arrested-accused-of-repeated-abuse-of-son-78001.html>.

¹⁶⁹ *Americans to Stand Trial for Abusing Russian Child*, THE VOICE OF RUSSIA (Jan. 8, 2013), http://english.ruvr.ru/2013_01_08/Americans-to-stand-trial-for-abusing-Russian-child/.

¹⁷⁰ *U.S. Court Convinced Maxim Kuzmin's Death Accidental*, PRAVDA.RU (Mar. 19, 2013), http://english.pravda.ru/news/hotspots/19-03-2013/124102-maxim_kuzmin-0/.

¹⁷¹ *Kremlin's Child Advocate 'Upset' as US Parents Cleared*, RIA NOVOSTI (Mar. 19, 2013), <http://en.rian.ru/world/20130319/180106575.html>.

¹⁷² Betsy Blaney, *Prosecutors: No Charges in Adopted Russian Boy's Death*, USA TODAY (Mar. 18, 2013), <http://www.usatoday.com/story/news/nation/2013/03/18/adopted-russian-boy-texas/1997631/>.

However, the majority of failed adoptions are less black and white, and involve a multitude of intersecting contributing factors. These include: problems with parental screening;¹⁷³ incomplete disclosure of the special needs of (especially older) institutionalized children;¹⁷⁴ and inadequate pre-adoption training¹⁷⁵ and post-adoption support¹⁷⁶ for parents in light of those needs. As a result, a disproportionate number of intercountry adoptions from Russia, as compared to other sending countries, have resulted in dissolution¹⁷⁷ – primarily due to behavioral and attachment issues relating to institutionalization – or death.¹⁷⁸

The Russian government has responded to various incidents of adoption failures with political statements of condemnation. The repeated rhetoric is that Russian children in America are not adequately protected from negligence and abuse, in part due to lenient sentences.¹⁷⁹

¹⁷³ See, generally, Allen, *supra* note 105, at 1704 (noting the Masha Allen case as an example of “the system’s failure to discover red flags in a prospective adopter’s background”); *New Adoption Rules Urged after Murder*, CHICAGO TRIBUNE (Jul. 13, 2005) (reporting the Russian call for psychological testing for prospective adoptive parents of Russian children, in the wake of the Nina Hilt case).

¹⁷⁴ Vargas, *supra* note 163 (noting that the high number of Russian adoptee deaths “could be in part because many of the Russian children who are adopted have behavioral and developmental problems either passed to them from parents with poor prenatal care, including fetal alcohol syndrome, or the result of their growing up in orphanages. Adoptive parents ... are given little preparation for what to expect”); Cindi Lash, *Overwhelmed Families Dissolve Adoptions*, POST-GAZETTE (Aug. 14, 2000), <http://old.post-gazette.com/headlines/20000814russiadaytwo1.asp> (noting a growing incidence of dissolution of Russian and Eastern European adoptions due to psychological problems associated with institutionalization).

¹⁷⁵ *New Adoption Rules Urged after Murder*, *supra* note 173 (reporting the Russian Education Ministry’s call for mandatory training programs for prospective adoptive parents, in the wake of the Nina Hilt case); Deborah Tedford, *Russian Case Spotlights Potential Adoption Risks*, NATIONAL PUBLIC RADIO (Apr. 13, 2010) (noting that [untrained] adoptive parents can exacerbate the “wounds of institutional kids” by overstimulation).

¹⁷⁶ See, e.g., cases of David Polreis Jr., Nina Hilt and Jessica Haggman, discussed *supra*; see, generally, Diane Mapes, *It Takes More than Love: What Happens with Adoption Fails*, TODAY (Aug. 1, 2012), <http://www.today.com/moms/it-takes-more-love-what-happens-when-adoption-fails-918076> (discussing the dissolution of adoptions due to parents’ inability to cope with the special psychological needs of older adopted children).

¹⁷⁷ Dissolution refers to the severance of the legal relationship between adoptive parent and adopted child after the adoption is legally finalized: *Adoption Disruption and Dissolution*, CHILD WELFARE INFORMATION GATEWAY, June 2012, at 3, available at https://www.childwelfare.gov/pubs/s_disrup.pdf. It results in privately- or state-arranged foster care or adoption by new care-givers. On the disproportionate number of Russian adoption dissolutions, see: Lash, *supra* note 174 (reporting “a much higher incidence of problem cases’ that lead to failed adoptions among Russian and Eastern European children”); *Russian Orphans Present Unique Challenges: One Family’s Story*, RIA NOVOSTI (Dec. 14, 2012), <http://en.ria.ru/russia/20121214/178147175.html> (“Adoption experts say Russian orphans are more likely to exhibit [self-soothing] behaviors because they are generally kept in state care for longer periods of time than children in some other countries. They are also institutionalized, rather than being housed in smaller, foster care homes ... and are more often removed from their homes by authorities rather than being abandoned at birth. ... There is a higher incidence in Russia of things like exposure to drugs, abuse, neglect, and fetal alcohol syndrome.”).

¹⁷⁸ Vargas, *supra* note 163 (“Adoption experts said they could not point to as many deaths among children adopted from any other country.”).

¹⁷⁹ *Russian Orphans Present Unique Challenges*, *supra* note 177 (“There is still frustration among many in the Russian Federation about what they see as a double standard that allows adoptive

Failed adoptions have also prompted occasional threats of a moratorium on intercountry adoptions to American parents,¹⁸⁰ which have at times resulted in delays in processing adoption orders¹⁸¹ and regional bans.¹⁸²

More substantively, a number of legislative revisions of the Russian intercountry program have taken place. For example, in 1998, partly in response to a 1997 incident involving alleged abuse of Russian adoptees by their American parents on the flight from Russia to the

U.S. parents who harm their Russian children to dodge the harsher penalties many Russian officials feel they deserve.”); Herszenhom, *supra* note 164 (citing the Russian Foreign Ministry describing the Craver verdict as “amazingly and flagrantly irresponsible”); Barry, *supra* note 8 (quoting the first deputy chief of the pro-Kremlin United Russia party, responding to the acquittal of Miles Harrison: “When we give our children to the West and they die, for some reason the West always tells us it was just an accident.”); *Russian MFA Information and Press Department Commentary on the Acquittal Handed Down by an American Court for Miles Harrison who had been Charged with Involuntary Manslaughter in the Death of his Russian Adoptee Dima Yakovlev*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION, *supra* note 10 (referring to the Miles Harrison acquittal as “repulsive and unprecedented”, and inferring a connection between Chase Harrison’s status as a Russian adoptee, and the lack of adequate punishment for the tragedy of his death); Konstantin Dolgov, Russian Foreign Ministry Human Rights Envoy, *Letter to Senator Landrieu* (Jan. 14, 2013), available at [http://assets.nationaljournal.com/pdf/Dolgov-Landrieu%20\(Russian\).pdf](http://assets.nationaljournal.com/pdf/Dolgov-Landrieu%20(Russian).pdf) (translation:

http://www.ccaainstitute.org/images/stories/pdf/international_adoption/english%20translation%20-%20russian%20response%20to%20dec%2021%20congressional%20letter.pdf) (hereinafter *Letter to Senator Landrieu*) (“We cannot accept outrageous cases of lawlessness, when the murderers of Russian children were released directly in the courtroom or when they got away with probation, while we learnt from the mass media that the U.S. justice can demonstrate due severity in cases of abuse against minor U.S. citizens.”).

¹⁸⁰ Shannon Thompson, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 703, 705 (1999) (noting legislation considered by the Russian Duma in 1998 to “restrain or practically restrict international adoption of Russian children.”); Vargas, *supra* note 163 (noting “Russian officials initially called for a moratorium on U.S. adoptions [following Nina Hilt’s 2006 death] although they have eased back on the threat.”); John Kass, *No Returns or Exchanges: Case of Boy sent back to Moscow Alone Reopens Debate on Russian Adoptions*, CHICAGO TRIBUNE (Apr. 13, 2010) (reporting the Russian foreign minister’s response to the 2010 Hansen case – “We have taken the decision to suggest a freeze on any adoptions to American families until Russia and the U.S. sign an international agreement.”); Anna Redyukhina, *Saving Foreign Adoption*, THE WASHINGTON POST (Jun. 22, 2010), <http://russianow.washingtonpost.com/2010/06/saving-foreign-adoption.php>; *Russia to Halt U.S. Adoptions Amid Domestic Violence Claims*, USA TODAY (Feb. 11, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-02-11/Russia-US-adoptions/53048064/1> (discussing a February 2012 call for suspension of American adoptions following an “incessant string of crimes”).

¹⁸¹ See, e.g., *Judge Upholds Child Support in Russian Adoption*, COLUMBIA DAILY HERALD (Jul. 13, 2012), <http://columbiadailyherald.com/sections/news/state/judge-upholds-child-support-russian-adoption.html> (noting that the Hansen case “contributed to a decision by Russia in 2010 to delay some adoptions by U.S. parents”); *Notice: Regional Suspensions on Adoption Processing in Russia*, INTERCOUNTRY ADOPTION, U.S. DEP’T OF STATE (Mar. 1, 2012) (noting that the Department of State has received reports of a “de facto freeze” on adoptions to the U.S. from some parts of Russia).

¹⁸² *Siberians Ban Americans from Adopting Russian Children*, RIA NOVOSTI (Jul. 5, 2012), http://english.ruvr.ru/2012_07_05/Siberians-bar-Americans-from-adopting-Russian-children/ (reporting a Kemerovo Region bill preventing Americans from adopting children on the territory of the region, in response to three deaths of Kemerovo Region children in American families since 1990).

U.S.,¹⁸³ the Russian Family Code was amended to increase state control over adoptions, and ban the involvement of intermediaries or “facilitators”¹⁸⁴ in light of problems relating to corrupt intermediary practices and charges.¹⁸⁵ In 2000, a Presidential decree required Russian government accreditation of foreign adoption agencies.¹⁸⁶ In 2005, the length of time a child must remain the state orphan database before adoption by a foreigner increased from three months to six months.¹⁸⁷ Partly as a result of these measures, adoptions of Russian children to America peaked in 2004, and have been steadily declining since then,¹⁸⁸ although this decline has not been accompanied by an increase in domestic adoptions.¹⁸⁹

The most significant overhaul of Russia-U.S. adoptions took place in 2012. Precipitated by the Justin Hansen incident,¹⁹⁰ a year of negotiations¹⁹¹ between Russia and the U.S. resulted in the signing of the Russian-American Agreement¹⁹² on July 13 2011, which entered into force on November 1 2012.¹⁹³ The Russian-American Agreement aimed to “strengthen procedural safeguards” in the U.S.-Russia adoption process,¹⁹⁴ and addressed many of the screening, training and monitoring concerns arising from aforementioned cases of failed adoptions.¹⁹⁵

¹⁸³ Kleem, *supra* note 66, at 331.

¹⁸⁴ Russian Family Code, *supra* note 127, § 126.1 (enacted by Federal Law NO. 94-FZ of June 27, 1998) (“Any intermediary activity in the adoption of children, that is, any activity of third parties with the purpose of selecting and transferring children for adoption in the name and in the interest of persons wishing to adopt children shall be impermissible.”); *see, further*, Thompson, *supra* note 180, at 710 (discussing the amendments).

¹⁸⁵ Allen, *supra* note 105, at 1713-14 (discussing problems relating to corrupt facilitators).

¹⁸⁶ Hora, *supra* note 105, at 1019 (“On March 29, 2000, Russian President Vladimir Putin signed a decree [that] requires that foreign adoption agencies be accredited by the Russian government and establish offices in Russia.”). *Cf.* Anna Arutunyan, *Foreign Adoptions Down in Russia as Foster Care Grows*, THE MOSCOW NEWS (Nov. 27, 2008), <http://themoscownews.com/news/20081127/55359067.html> (noting new accreditation rules for foreign adoption agencies coming into effect in 2007).

¹⁸⁷ Laura Ashley Martin, “[T]he universal language is not violence. It’s love[.]” *The Pavlis Murder and Why Russia Changed the Russian Family Code and Policy on Foreign Adoptions*, 26 PENN ST. INT’L L. REV. 709, 724-5 (2007-2008); Russian Family Code, *supra* note 127, § 124.4.

¹⁸⁸ *Statistics: Russia*, INTERCOUNTRY ADOPTION, U.S. DEP’T OF STATE, http://adoption.state.gov/about_us/statistics.php (showing a peak of 5,862 adoptions in 2004, down to 1,079 in 2010).

¹⁸⁹ Arutunyan, *supra* note 186 (noting that the decline in Russian adoptions to the U.S. “do[es] not indicate that Russians are adopting more children” but rather that the number of children cared for in alternative in-country foster care initiatives has increased).

¹⁹⁰ Allen, *supra* note 105, at 1693.

¹⁹¹ *FAQs: Bilateral Adoption Agreement with Russia*, INTERCOUNTRY ADOPTION, U.S. DEP’T OF STATE (Oct. 15, 2012), available at http://adoption.state.gov/content/pdf/Russia_Bilateral_Adoption_Agreement_FAQs1012.pdf (noting that negotiations began in April 2010).

¹⁹² *Supra* note 14.

¹⁹³ *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 191.

¹⁹⁴ *Id.* (at “Why is there a Bilateral Adoption Agreement with Russia?”).

¹⁹⁵ Russian-American Agreement, *supra* note 14, §8(1), §10(1) (pre-approval state screening of adoptive parents’ suitability and eligibility, taking into account “all information available about the

Moreover, the Agreement acknowledges Russian concerns about the equal treatment of Russian children in America, by expressly emphasizing the equality of adopted children regardless of their origin.¹⁹⁶

C. January 1, 2013: The Adoption Ban

The Russian government expressed its commitment to continued cooperation on improving the intercountry adoption process as recently as September 2012.¹⁹⁷ However, before the Russian-American Agreement had been fully implemented,¹⁹⁸ and before its impact on the adoption process had been felt or tested,¹⁹⁹ Russia-U.S. adoptions came to an abrupt halt with the passing of the Adoption Ban on December 28 2012,²⁰⁰ which took effect on January 1, 2013.²⁰¹ The Russian-American Agreement, according to its terms, will remain in force for one year from

child matched with the prospective adoptive parents” including medical and special needs); §10(1)(b) (psycho-social preparation of prospective adoptive parents that takes into account “detailed information about the child’s social situation and health, and his or her cultural and social environment in the Country of Origin”); §14 and §5 (requiring that the Sending Country be informed and consulted on post-adoption dissolutions and consent to subsequent placements); §5(1) (post-adoption monitoring, including the submission of reports to the Country of Origin). *See, generally*, Allen, *supra* note 105, at 1727-17331 (discussing the major changes to the Russia-U.S. adoption process proposed by the treaty). *See, further*, *Russia to Halt U.S. Adoptions Amid Domestic Violence Claims*, *supra* note 180 (reporting that after the signing of the U.S.-Russia Agreement, but prior to its ratification, Russia briefly called for a further bilateral accord allowing Russian monitors to carry out post-adoption inspections in American homes).

¹⁹⁶ Russian-American Agreement, *supra* note 14, § 13(2) (“[A child adopted in accordance with this Agreement] shall have the same rights and protections as any other adopted child who has the status of a citizen in the territory of the Receiving Country.”); *see, further*, *Preamble* (“Recognizing that a child adopted in accordance with the procedures established by this Agreement should be provided with the same advantages and the same rights that are guaranteed to him or her as a citizen or lawful permanent resident of the Receiving Country (whichever applies).”).

¹⁹⁷ *Joint Statement of the U.S.-Russian Consultations on the Bilateral Agreement Regarding Cooperation in Adoption of Children*, Press Release, EMBASSY OF THE UNITED STATES MOSCOW, RUSSIA (Sep. 28, 2012) (“The United States and the Russian Federation confirm their mutual preparedness to continue cooperation on an intercountry adoption process that provides better safeguards for adoptive children...”). *See, further*, *The Russia-USA Child Adoption Agreement Successfully Went Through the Ratification Process*, CHILDREN’S RIGHTS COMMISSIONER FOR THE PRESIDENT OF THE RUSSIAN FEDERATION (2011), <http://english.rfdeti.ru/display.php?id=4226> (Children’s Ombudsman Pavel Astkhov praising the Agreement as “offer[ing] more guarantees” of Russian-born children adopted abroad).

¹⁹⁸ *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 191 (noting that the Russian government expected adoption agency authorization procedures to become effective on or about March 1, 2013).

¹⁹⁹ *See, generally*, Allen, *supra* note 105 (discussing U.S.-Russia Agreement’s likelihood of success).

²⁰⁰ *Supra* notes 4 - 6, and accompanying text.

²⁰¹ *Alert: Legislation to Ban Intercountry Adoption by U.S. Families*, Intercountry Adoption, U.S. DEPT. OF STATE, Jan. 3, 2013, available at http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_8 (noting that the Adoption Ban went into effect on January 1, 2013).

Russia's notification of its termination.²⁰² There was some speculation that because of this provision, Russia would be obliged to allow adoptions to continue for a further year,²⁰³ but the Kremlin has refuted this.²⁰⁴ According to the U.S. State Department, there were 884 adoptions in process that were interrupted by the ban, 337 of which involving parents who had already met the prospective adoptee.²⁰⁵ In the wake of the ban, the U.S. expressed hope that cases that had begun to be processed would be seen to completion "in the spirit of the original agreement and out of humanitarian concern."²⁰⁶ Russia's Supreme Court issued a letter in January 2013 stating that adoptions that had been court-approved²⁰⁷ prior to the New Year would be completed, notwithstanding the ban, and around twenty-five such adoptions were completed in the following months.²⁰⁸

²⁰² Russian-American Agreement, *supra* note 14, § 17(5) ("The agreement is valid over one year beginning from the date on party informs the other via diplomatic channels about its intention to withdraw from the present agreement.").

²⁰³ Ellen Barry, *Russia to Let a Few U.S. Adoptions Go On*, THE NEW YORK TIMES (Jan. 10, 2013) (quoting a prominent Russian lawyer as stating that adoptions should continue due to the precedence of the international treaty over the Adoption Ban); *Moscow: Americans can Adopt Russian Kids Until 2014*, CNN (Jan. 11, 2013), <http://www.cnn.com/2013/01/10/world/europe/russia-us-adoptions>; *Russia-U.S. Adoption Deal to Last Till 2014 – Putin Spokesman*, RIA NOVOSTI (Jan. 10, 2013), http://en.rian.ru/russia/20130110/178694199/Bilateral_Russia-US_Adoption_Agreement.html.

²⁰⁴ Barry, *supra* note 203 (quoting Kremlin press secretary: "There is no direct link between [the bilateral treaty] and the ban on adoption. The agreement is not something that makes adoption obligatory. It regulates the practice."); *Kremlin Comment Unlikely to Change Russian Adoption Ban*, RIA NOVOSTI (Jan. 10, 2013), <http://en.ria.ru/russia/20130110/178697643.html> ("the Russian Foreign Ministry emphasized that the agreement was now 'terminated,' not suspended as stated by the U.S. State Department a day earlier.").

²⁰⁵ Candice Ruud, *Local Family Skirts by Ban on Russian Adoption*, NEWSDAY (Mar. 11, 2013); *see, further*, Olga Belogolova, *Russian Adoption Ban is Personal for Some U.S. Lawmakers*, NATIONAL JOURNAL (Jan. 29, 2013) ("as many as 1,000 American families had already begun the adoption process when the Russian law passed. Many families have already traveled to Russia and met the children they were hoping to adopt."). Note that Russia requires international adoptive parents to travel to Russia to spend time with their prospective adoptive child once a match has been made, but prior to the final court order: *Traveling to Russia*, EUROPEAN CHILDREN ADOPTION SERVICES, <http://www.ecasus.org/Site.Programs.AdoptionfromRussia.TravelingtoRussia.go>. *C.f.* Barry, *supra* note 203 ("Russian officials have said that there are 46 children whose adoptions by American families have been partially processed, but that not all of them have court orders.").

²⁰⁶ Barry, *supra* note 203 (quoting Victoria Nuland, a spokesperson for the State Department).

²⁰⁷ Russian Family Code, *supra* note 127, § 125(1) ("The adoption shall be effected by the court upon the application of the persons wishing to adopt the child."). *See, generally*, Belogolova, *supra* note 205 ("The court decree comes late in the process, after parents have been matched with a child and orphanage workers have begun preparing the child to join a new family. After court approval, there is a 30-day waiting period, and only then can parents return and make final arrangements to take the child to the United States.").

²⁰⁸ Ruud, *supra* note 205 (stating that around 25 American families have completed the adoption of a Russian child since the Adoption Ban took effect); Jim Maceda, *Outrage, Sadness as Americans Barred from Adopting Russian Children*, NBC NEWS (Mar. 30, 2013), http://worldnews.nbcnews.com/_news/2013/03/30/17504450-outrage-sadness-as-americans-barred-from-adopting-russian-children?lite (referring to a Minnesota couple who adopted their Russian daughter in February as the "last lucky couple to leave Russia with an adopted child."); *c.f.* Blake Ellis, *Russia's Adoption Ban Costs Families their Tax Credit*, CNN MONEY (Mar. 15, 2013) ("The State Department estimates that only around 50 families [had already received a court ruling and

Public response to the ban in Russia was mixed. A 10,000-strong “march against scoundrels”, protesting the ban, took place in Moscow in January.²⁰⁹ An equally large pro-ban rally took place in March, a day after Texan authorities found that Max Shatto’s²¹⁰ death was an accident.²¹¹ In the U.S., the ban caused a “sharp reaction in Washington.”²¹² Both houses of Congress passed resolutions expressing disappointment, urging reconsideration and calling for the conclusion of adoptions of children who had already been matched with adoptive parents.²¹³ The ban brought uncertainty and grave disappointment to adoptive parents at various stages of completing a Russian adoption, including those who had already traveled to Russia and bonded with their matched child.²¹⁴ An appeal has been filed with the European Court of Human Rights on behalf of prospective American adoptive parents whose applications were interrupted by the Adoption Ban.²¹⁵

final adoption decree].”); Jerry Votava, *Russia Delays Enforcement of U.S. Adoption Ban Law*, JURIST (Jan. 10, 2013), <http://jurist.org/paperchase/2013/01/russia-delays-enforcement-of-us-adoption-ban-law.php> (“46 adoptions ... were in process when the [Adoption Ban] was scheduled to take effect.”).

²⁰⁹ Ellen Barry & Andrew Roth, *Russians Rally Against Adoption Ban in a Revival of Anti-Kremlin Protests*, THE NEW YORK TIMES (Jan. 13, 2013) (noting that the city authorities estimated a turnout of 9,500, while activists reported at turnout of 24,000). *See, further, Russian Lawmakers Reject Petition Against Adoption Ban*, RIA NOVOSTI (Jan. 14, 2013), <http://en.ria.ru/politics/20130114/178770385.html> (noting a petition to repeal the ban, which garnered more than 100,000 signatures, but that was rejected by a Russian Duma committee).

²¹⁰ *Supra* note 170 and accompanying text.

²¹¹ Elks & Gutterman, *supra* note 29. According to polls, “about half of Russians approve of the Dima Yakovlev Act ... while about 30 percent disapprove” (Fred Weir, *Emotions Intensify over U.S.-Russia Adoption Ban*, THE CHRISTIAN SCIENCE MONITOR (Mar. 4, 2013), <http://www.alaskadispatch.com/article/20130304/emotions-intensify-over-us-russia-adoption-ban>).

²¹² David Herszenhorn, *Russian Adoption Ban Brings Uncertainty and Outrage*, THE NEW YORK TIMES (Dec. 28, 2012).

²¹³ S. Res. 628, 112th Cong. (2011-2012); H.R. Res. 24, 113th Cong. (2013-2014).

²¹⁴ *Id.* *See, further*, Ruud, *supra* note 205; Ellis, *supra* note 208 (noting the financial cost of interrupted adoptions); Belogolova, *supra* note 205 (“As many as 1,000 American families had already begun the adoption process when the Russian law passed. Many families have already traveled to Russia and met the children they were hoping to adopt.”).

²¹⁵ Yulia Ponomareva, *Americans Challenge Adoption Ban in European Court*, RUSSIA BEYOND THE HEADLINES (Jan. 27, 2013), http://rbth.ru/society/2013/01/27/americans_challenge_adoption_ban_in_strasbourg_22251.html (noting a complaint filed with the ECHR by lawyers from the Center of International Protection, asking the ECHR to allow in-process adoptions to proceed, and to oblige Russia to overturn the law); *International Law Experts Discuss “Anti-Magnitsky” Legislation*, RIGHTS IN RUSSIA (Jan. 24, 2013), available at <http://hro.rightsinrussia.info/archive/european-court/cip/adoptions>. The case has not yet been listed on the European Court of Human Rights website: <http://www.echr.coe.int/ECHR/EN/Header/Pending+Cases/Pending+cases/Calendar+of+scheduled+hearings/>.

II. SETTING THE FRAMEWORK: INTERNATIONAL LAWS OF CHILD WELFARE AND ADOPTION

The effect of Russia's ban on adoptions to American families is yet to play out, but will certainly involve a significant decrease in Russian intercountry adoptions generally, due to the high proportion of Russian international adoptees historically adopted to the U.S.²¹⁶ Part II considers the international laws and principles relevant to Russia's prioritization of in-country care over American adoptions. Part II.A traces the development of international legal principles and instruments relating to intercountry adoption, including the Hague Convention and alternative bilateral treaties. Part II.B introduces the Council of Europe approach to international adoption, including European Court of Human Rights case law.

A. *The International Approach: Shifting Prioritization of Intercountry Adoption*

1. Best Interests and Subsidiarity Principles

The incidence of intercountry adoption steadily grew in the latter half of the 21st century, however an international framework to regulate the practice was lacking until promulgation of the 1993 Hague Convention on Intercountry Adoption.²¹⁷ A number of preceding international instruments are also relevant to intercountry adoption practice and policy. The U.N. Declaration on the Rights of the Child set forth the principle that the "best interests of the child shall be the paramount consideration" in all laws enacted for the protection of minors.²¹⁸ It was not until the 1980s that the subject of international adoption was specifically addressed, with the U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (hereinafter Declaration on Adoption).²¹⁹ The Declaration on Adoption affirms the paramountcy of the "best interests" principle in

²¹⁶ *International Adoption Statistics: Russia*, AUSTRALIAN INTERCOUNTRY ADOPTION NETWORK, <http://www.aican.org/statistics.php?region=0&type=birth> (last visited Apr. 15, 2012) (2011: 38.66% of Russian international adoptees were adopted to the U.S.; 38.29% in 2010; 41.57% in 2009).

²¹⁷ *Supra* note 70. *See, generally*, Carlson, *supra* note 94, at 247 (noting that prior to the Hague Convention, "international adoption law consisted of vague, hortatory declarations of little practical value and bilateral or regional agreements of limited scope").

²¹⁸ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., 841st plen. mtg., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) [hereinafter Declaration of the Rights of the Child], princ. 2.

²¹⁹ G.A. Res. 41/85, U.N. Doc. A/RES/41/85 (Dec. 1, 1986).

adoption matters,²²⁰ and sets out the first basic international framework for intercountry adoption practices.²²¹ Importantly, the Declaration establishes that intercountry adoption is subject to the subsidiarity principle: it prioritizes in-country (temporary) foster or other “suitable” care (the term seems wide enough to cover institutionalization) over intercountry (permanent) adoption,²²² and thereby evinces a preference for keeping children in their home countries as much as possible.²²³ In line with this neutrality towards intercountry adoption, the Declaration is deferential to national governments regarding the decision of whether or not to participate in intercountry adoption – in short, it does not speak in favor of, or impose an obligation to establish, intercountry adoption.²²⁴ This permissive, “last resort” approach to intercountry adoption is replicated in the 1989 United Nations Convention on the Rights of the Child,²²⁵ to which Russia is a state party.²²⁶ The UNCRC emphasizes a child’s right to grow up in the context of his/her family and culture.²²⁷

More recently, a shift has taken place in United Nations’ discourse on the prioritization of intercountry adoption vis-à-vis in-country institutionalization. In 2004, the United Nations Children’s Fund (UNICEF), which monitors the UNCRC, issued a “clarifi[cation] that institutionalization was to be used only as a last resort and as a temporary measure until a family could be found,” listing intercountry adoption as

²²⁰ *Id.*, art. 5 (“In all matters relating to the placement of a child outside the care of the child’s own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.”).

²²¹ *See, generally*, Liu, *supra* note 59, at 195-7.

²²² Declaration on Adoption, *supra* note 219, art. 17 (“If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.”).

²²³ Liu, *supra* note 59, at 197.

²²⁴ Declaration on Adoption, *supra* note 219, pmbl (“The principles set forth hereunder do not impose on states such legal institutions as foster placement or adoption.”); art. 17 (“...intercountry adoption *may* be considered as an alternative means of providing the child with a family” [emphasis added]); pmbl. (“Recognizing that under the principal legal systems of the world, various valuable alternative institutions exist, such as the Kafala of Islamic Law, which provide substitutive care to children who cannot be cared for by their own parents,” and further, “Recognizing further that only where a particular institution is recognized and regulated by the domestic law of a State would the provisions of this Declaration relating to that institution be relevant...”).

²²⁵ *Supra* note 69, art. 21 (“State Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: ... (b) Recognize that intercountry adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin”). *See, also*, art. 20(3) (listing foster placement, kafalah of Islamic law, adoption and institutionalization as possible types of “alternative care” for children deprived of their family environment).

²²⁶ The UNCRC has been ratified by every country except the United States, Somalia and South Sudan: *The Convention on the Rights of the Child*, THE STATE OF THE WORLD’S CHILDREN 2012, UNICEF, at 16 (available at <http://www.unicef.org/sowc2012/pdfs/SOWC-2012-The-Convention-on-the-Rights-of-the-Child.pdf>).

²²⁷ UNCRC, *supra* note 69, art. 8(1).

“one of a range of care options” that may be optimal for “individual children who cannot be placed in a permanent family setting in their countries of origin.”²²⁸ The most recent UNICEF position on intercountry adoption avoids explicit references to the comparative value of institutionalization and intercountry adoption.²²⁹ Rather, it emphasizes children’s rights – to know and be cared for by his or her parents as far as possible;²³⁰ and to grow up in a family environment²³¹ – and provides that “appropriate and stable family-based solutions should be sought” for children not in the care of their parents.²³² The “stable” qualifier seems to imply a preference for intercountry (permanent) adoption over in-country (temporary) foster-care; the former is expressly listed as one possible “stable care option.”²³³

2. The Hague Convention

In 1987, the Permanent Bureau of the Hague Conference noted the desirability of a new international convention on intercountry adoption cooperation.²³⁴ Preparation of the convention was included in the agenda of the Seventeenth Session of the Hague Conference as a matter of priority, in recognition of “insufficient existing domestic and international legal instruments, and the need for a multilateral approach.”²³⁵ Russia was a participant in the final of three drafting sessions.²³⁶ The Hague Convention was adopted in 1993, and applies to

²²⁸ Jini Roby, *Understanding Sending Country’s Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & FAM. STUD. 303, 318-319 note 87 (2004).

²²⁹ *UNICEF’s Position on Inter-country Adoption*, PRESS CENTRE, UNICEF, Jul. 22, 2010, available at http://www.unicef.org/media/media_41918.html.

²³⁰ UNCRC, *supra* note 69, art. 7(1).

²³¹ UNCRC, *supra* note 69, prmb. (“Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”); *UNICEF’s Position on Inter-country Adoption*, *supra* note 229 (stating that the UNCRC “clearly states that every child has the right to grow up in a family environment”).

²³² *UNICEF’s Position on Inter-country Adoption*, *supra* note 229.

²³³ *Id.* (“Inter-country adoption is among the range of stable care options. For individual children who cannot be cared for in a family setting in their country of origin, inter-country adoption may be the best permanent solution.”). *Note*: the ECtHR case of *Pini v Romania* (discussed *infra*, note 340) demonstrates that foster care has the potential to provide a stable, family environment ([153]).

²³⁴ Hans van Loon, *Note on the Desirability of Preparing a new Convention on International Co-operation in Respect of Intercountry Adoption*, Prel. Doc. No. 9 of December 1987 (for the attention of the Special Commission of January 1988), in *Hague Conference on Private International Law, Proceedings of the Sixteenth Session (1988)*, Tome I, *Miscellaneous Matters*, The Hague 1991, pp. 165-185.

²³⁵ Gonzalo Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE SEVENTEENTH SESSION, available at <http://www.hcch.net/upload/expl33e.pdf> [hereinafter Hague Convention Explanatory Report].

²³⁶ *Id.* at n. 19 (listing the non-Member States that participated in the third meeting of the Special Commission on Intercountry adoption, 3 – 14 February 1992).

international adoptions between contracting states.²³⁷ Russia signed the Convention in 2000, but has not ratified,²³⁸ meaning Russia is not legally bound by the Hague Convention but is obliged “not to defeat [its] object and purpose.”²³⁹

The Hague Convention represents a shift in international discourse away from the absolute last resort approach to intercountry adoption. Like the UNCRC, the Hague Convention draws short of declaring that children have a “right to a family,” although the (non-binding) preamble, echoing the UNCRC, does recognize “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”²⁴⁰ Professor Dillon thus concludes that the Hague Convention “strongly implies – though this might have been made clearer – that in-country institutional care and non-family care are not superior alternatives to intercountry adoption.”²⁴¹ The Preamble also recognizes that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found” in the state of origin.²⁴²

This formulation – “children for whom a suitable family cannot be found” – replaced an earlier draft, which referred instead to “children who cannot in any suitable manner be cared for in his or her country of origin.”²⁴³ The modification, which was initially met with some resistance in the drafting process,²⁴⁴ is significant. Although the Hague Convention’s formulation of the subsidiarity principle does not expressly prioritize intercountry adoption over in-country foster-care and institutionalization,²⁴⁵ the Explanatory Report states that that was the

²³⁷ Hague Convention, *supra* note 70, art. 2(1).

²³⁸ *Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last accessed Apr. 16, 2013).

²³⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 18 (“A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.”).

²⁴⁰ Hague Convention, *supra* note 70, prmb. According to international law, preambles do not establish binding legal obligations, but do have “legal force and effect from the *interpretative* standpoint” (G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT’L L. 1, 25 (1951)).

²⁴¹ Dillon, *supra* note 60, at 213.

²⁴² Hague Convention, *supra* note 70.

²⁴³ Hague Convention Explanatory Report, *supra* note 235, [45].

²⁴⁴ Hague Convention Explanatory Report, *supra* note 235, [45] (noting that Colombia had unsuccessfully requested the modification in Working Document No. 2. The modification was subsequently “approved by a clear majority, without discussion of the substance”).

²⁴⁵ Hague Convention, *supra* note 70, art. 4(b) (“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.”). *See, generally*, Carlson,

intended and preferred interpretation of the substantive provisions in light of the Preamble.²⁴⁶ Ultimately, however, the Hague Convention is deferential, as a political necessity,²⁴⁷ to national governments in their choice to pursue, or not pursue, intercountry adoption as an option for their family-less children.²⁴⁸

3. Alternative Regulation: Bilateral Treaties

The U.S. government encourages participation in the Hague Convention as the preferred international instrument for governing intercountry adoption.²⁴⁹ However, like many sending and receiving countries, Russia has declined to sign the Hague Convention,²⁵⁰ claiming that the instrument does not sufficiently protect adoptee rights and interests.²⁵¹ Instead, Russia has pursued bilateral treaties with Italy,²⁵² France²⁵³ and

supra note 94, at 261-2 (describing the cautious approach of the Hague's Special Commission on Intercountry Adoption on this point, and noting reactive concern among the U.S. delegation and observers, "some of whom questioned whether the U.S. could agree to a Convention that perpetuated the U.N.'s potentially pernicious attitude toward intercountry adoption").

²⁴⁶ Hague Convention Explanatory Report, *supra* note 235, [46] ("The idea behind the amendment [of the Preamble] is that the placement of a child in a family, including in intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization."). See, further, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention Guide to Good Practice, Guide No. 1*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 30 (2008) ("It is sometimes said that the correct interpretation of "subsidiarity" is that intercountry adoption should be seen as a "last resort". This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalization is considered as "a last resort."").

²⁴⁷ Carlson, *supra* note 94., at 262-4 (discussing the drafting negotiations over whether to move away from the U.N.'s prior stance on intercountry adoption).

²⁴⁸ Dillon, *supra* note 60, at 215 ("The Hague Convention leaves a good deal of discretion in the hands of national bureaucracies, and does not clearly address the human rights implications of institutionalization.").

²⁴⁹ U.S. Dep't of State, Helsinki Commission Testimony (Sep. 14, 2005), <http://2001-2009.state.gov/r/pa/ei/otherstmy/54301.htm> ("[W]e encourage other nations to become parties to the Hague Convention. The U.S. government considers this instrument to be most effective in establishing a set of internationally agreed requirements and procedures to govern intercountry adoptions.").

²⁵⁰ O'HALLORAN, *supra* note 34, at 161 ("The Hague Convention does not apply to many countries currently participating in intercountry adoption."). See, generally, *Status Table, Hague Convention*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (significant non-member sending nations include Ethiopia, South Korea, and Ukraine).

²⁵¹ *Russian-Italian Bilateral Adoption Treaty*, BLOG – RUSSIAN ADOPTION HELP (Oct. 9, 2009), <http://blog.russianadoptionhelp.com/2009/10/russian-italian-bilateral-adoption.html>.

²⁵² Российские дети – итальянские усыновители [Russian Children – Italian Adoptive Parents], *Zakonia* (Oct. 5, 2009), <http://www.zakonia.ru/news/30/49668>.

²⁵³ Yelena Kovachich, *Russia, France Sign Agreement on Child Adoption* (Nov. 18, 2011), <http://english.ruvr.ru/2011/11/18/60645603/>.

the U.S.²⁵⁴ Similar bilateral treaties with the United Kingdom, Holland, Spain and Germany are in progress.²⁵⁵

The first bilateral treaty was concluded with Italy in 2008,²⁵⁶ in response to concerns over child trafficking.²⁵⁷ The Russian-Italian Adoption Treaty goes further than the Hague Convention in some respects, providing for “a higher possibility of enforced intervention in cases of disruption, abuse or neglect of adopted Russian children.”²⁵⁸ This agreement was used as a template for the subsequent agreements with France and the United States.²⁵⁹

In terms of the subsidiarity principle, taking the Russian-American Agreement as an example, the Preamble reflects the language of the Hague Convention, referring to intercountry adoption as a possible solution where a “suitable family” cannot be found in the child’s country of origin.²⁶⁰ Article 3 provides that the treaty covers adoptions where child cannot be brought up in his or her birth family, and “it does not appear to be possible to settle him or her for upbringing or place him or her with a family that could provide for his or her upbringing or adoption in the Russian Federation.” This provision defers the decision of whether or not in-country care is available to the sending country, without taking a clear position on whether institutionalization is to be preferred or not to intercountry adoption. Domestic Russian law appears to prefer international adoption to institutionalization.²⁶¹

²⁵⁴ Russian-American Agreement, *supra* note 14.

²⁵⁵ *Russia to Sign Adoption Agreement*, UPI (Nov. 14, 2011), http://www.upi.com/Top_News/World-News/2011/11/14/Russia-to-sign-adoption-agreement/UPI-73961321290713/ (citing Children’s Rights Ombudsman Pavel Astkakhov). Pavel Astkakhov has stated that intercountry adoption should only take place if bilateral agreements are in place.

²⁵⁶ Российские дети – итальянские усыновители [Russian Children – Italian Adoptive Parents], *supra* note 252.

²⁵⁷ Smetanina, *supra* note 126 (“That agreement was concluded only after a scandal erupted over the illegal export of Russian children.”).

²⁵⁸ *Russian-Italian Bilateral Adoption Treaty*, *supra* note 251. *C.f.* O’HALLORAN, *supra* note 34, at 161 (arguing that bilateral treaties “undermine the international effort to build a principled framework for regulating this form of adoption.”).

²⁵⁹ Anna Redyukhina, *Saving Foreign Adoption*, THE WASHINGTON POST (Jun. 22, 2010), <http://russianow.washingtonpost.com/2010/06/saving-foreign-adoption.php>.

²⁶⁰ Russian-American Agreement, *supra* note 14, prmb1 (“Recognizing that intercountry adoption of a boy or girl . . . may offer the advantages of a permanent family to a child if a suitable family cannot be found for the child in the Country of Origin.”).

²⁶¹ Russian Family Code, *supra* note 127, art. 124(4) (“The adoption of children by foreign citizens or by stateless persons shall be admitted only in cases when it is impossible to give these children for upbringing into the families of citizens of the Russian Federation, who permanently reside on the territory of the Russian Federation, or for adoption to the children’s relatives, regardless of the citizenship or the place of residence of these relatives.”).

B. *The Council of Europe Approach: Ambiguity and Caution*

There is a strong tradition of both sending and receiving children via intercountry adoption in Europe.²⁶² A number of regional instruments are relevant to the practice. The European Convention on the Adoption of Children,²⁶³ which was revised in 2008,²⁶⁴ sets minimum standards for adoption laws in member states.²⁶⁵ The European Convention for Human Rights²⁶⁶ is not a child-specific instrument, but enshrines the right to respect for family life,²⁶⁷ and the right to start a family.²⁶⁸ Given the lack of strong enforcement mechanisms in the Hague Convention and the European Adoption Convention, Magdalena Forowicz observes that the European Court of Human Rights (hereinafter ECtHR) “has been able to play a fundamental role by enforcing these instruments within the framework of the ECHR.”²⁶⁹ The ECtHR has applied the ECHR to a number of adoption-related cases,²⁷⁰ including one relating to intercountry adoption.²⁷¹ Ingi Iusmen notes that “under the ECHR framework, intercountry adoption has been interpreted as an extreme measure.”²⁷² Russia, although a member of the Council of Europe, is yet to sign the ECAC,²⁷³ but is subject to the ECHR.²⁷⁴

²⁶² O’HALLORAN, *supra* note 34, at 138 (“Europe in general and Scandinavia in particular has also over many decades accepted children from other countries for adoption placements.”).

²⁶³ 634 U.N.T.S. 256, entered into force on 26 April 1968.

²⁶⁴ European Convention on the Adoption of Children (Revised), Nov. 27, 2008, C.E.T.S. 202 (hereinafter ECAC).

²⁶⁵ *Factsheet: Towards a European Adoption Procedure*, COUNCIL OF EUROPE (Sep. 7, 2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1496717&Site=DC>.

²⁶⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5; 213 U.N.T.S. 221 (hereinafter ECHR).

²⁶⁷ *Id.*, art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

²⁶⁸ *Id.*, art. 12 (“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”).

²⁶⁹ MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* 121 (2010).

²⁷⁰ See, e.g., *List of Judgments Concerning Adoption (non-exhaustive)*, COUNCIL OF EUROPE FAMILY LAW, available at http://www.coe.int/t/dghl/standardsetting/family/Case_law_en.asp.

²⁷¹ *Pini and Betrani and Manera and Atripaldi v Romania* (App Nos 78028/01; 78030/01), judgment, 22 June 2004, Reports 2004-V, 297 (hereinafter *Pini v Romania*). See, further, Nigar Gozum v Turkey, lodged with the ECtHR on Jan. 12, 2010 (currently pending).

²⁷² Ingi Iusmen, *The EU and International Adoption from Romania*, 27(1) INT’L J. L. POL. & FAM. 1, 6 (2013). See, further, Bainham, *supra* note 59, at 233 (arguing that for intercountry adoption to be justified under the ECHR, it must be demonstrated that no other solution can adequately meet the needs of the child).

²⁷³ *Chart of Signatures and Ratifications, European Convention on the Adoption of Children (Revised)*, Council of Europe (last accessed Apr. 18, 2013), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=202&CM=8&DF=&CL=ENG>.

The Council of Europe Parliamentary Assembly has affirmed both the best interests principle, and the subsidiarity principle, although without being clear on whether intercountry adoption should be subsidiary to in-country foster care and/or institutionalization.²⁷⁵ In 2005, some delegates to the Parliamentary Assembly signed a motion regarding the “less than positive attitudes to international adoptions” expressed by a number of Eastern European countries, including Romania and Russia, and calling for ascertainment of whether restrictions on intercountry adoptions are consistent with the “overarching interests of the child, considering the very high number of children living in institutions.”²⁷⁶

On the other hand, the Council of Europe has also expressed concern about the rise in intercountry adoptions from Russia in the 1990s,²⁷⁷ and the practice generally:

The purpose of international adoption must be to provide children with a mother and a father in a way that respects their rights, not to enable foreign parents to satisfy their wish for a child at any price; there can be no right to a child. The Assembly therefore fiercely opposes the current transformation of international adoption into nothing short of a market regulated by the capitalist laws of supply and demand, and characterized by a one-way flow of children from poor states or states in transition to developed countries. ... It wishes to alert European public opinion to the fact that, sadly, international adoption can lead to the disregard of children’s rights and that it does not necessarily serve their best interests. In many cases, receiving countries perpetuate misleading notions about children’s circumstances in their countries of origin and a stubbornly prejudicial belief in the advantages for a foreign child of being adopted and living in a rich country.²⁷⁸

²⁷⁴ *Chart of Signatures and Ratifications, ECHR*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

²⁷⁵ Eur. Parl. Ass., *Recommendation 1443: International Adoption: Respecting Children’s Rights*, 5th Sitting (2000), at 1, 2 and 3 [hereinafter *Recommendation 1443*] (“international adoption may be considered only if domestic solutions are not available.”). *C.f.* Eur. Parl. Ass., *Reply from the Committee of Ministers: Recommendation 1443*, 785th meeting of the Ministers’ Deputies, Doc. No. 9377 (Mar. 1, 2002) (noting the subsidiarity principle, but further opining that “international adoption can, nevertheless, have the advantage of providing a permanent family home to a child for whom no suitable family can be found in the country of origin.”).

²⁷⁶ Eur. Parl. Ass., *International Adoption: Motion for a Recommendation, presented by Mrs. Paoletti Tangheroni*, Doc. 10617 (Jun. 28, 2005).

²⁷⁷ Council of Europe Committee on Migration, Refugees and Demography, *International Adoption: Respecting Children’s Rights*, Doc. No. 8600 (Dec. 21, 1999) (“International adoption was unknown in the countries of the former eastern bloc. These countries in transition, in particular Albania, Romania, Bulgaria and Russia, have seen a worrying increase in adoption.”).

²⁷⁸ *Recommendation 1443*, *supra* note 275, at 1, 2 and 3.

This statement was accompanied by a number of recommendations, including that member states ratify the Hague Convention and develop bilateral cooperation necessary for the effective application thereof.²⁷⁹

III. EVALUATING THE BAN: RIGHTS AND DUTIES RELEVANT TO INTERCOUNTRY ADOPTION

Part III evaluates Russia's ban on adoptions to America in light of international law and Russia's duties to its children. Part III.A considers the political aspects of the Adoption Ban and intercountry adoption generally. Part III.B examines whether Russian children have a right to be adopted, and whether the Russian state has a duty to repeal the Adoption Ban. Russia has the prerogative to strive to meet her children's needs domestically, without resorting to intercountry adoption – there is no right to intercountry adoption *per se*, and no obligation under international law to recognize the institution of adoption. However, it is argued that the Adoption Ban represents the subordination of the best interests of children to state-centric political considerations. This is problematic, in terms of the immediate needs and interests of Russian children currently in need of families. Russia should be encouraged to reconsider the Adoption Ban, and pursue the dual goals of eliminating the need for intercountry adoption, and allowing the practice to continue, including to American families, in the interim.

A. *The Politicization of Orphan Welfare – in Russia and Beyond*

Russia's ban on adoptions to America has been variously defended as a proportionate response to deaths and other failed adoptions,²⁸⁰ and criticized as Magnitsky Act retaliation that uses children as “political pawns.”²⁸¹ On the one hand, Russia has expressed concern on many occasions over failed adoptions and the number of Russian adoptees to have died in America, and threatened moratoriums or bans on intercountry adoption in response.²⁸² Some Russian politicians have also

²⁷⁹ *Id.*, at 5(i) and 5(iii).

²⁸⁰ Dolgov, *Letter to Senator Landrieu*, *supra* note 179 (“The decision taken ... to ban the adoption of Russian children to the U.S. was a difficult but necessary measure provoked by a consistently non-constructive position of the U.S. federal and local authorities.”).

²⁸¹ Human Rights Watch, *Russia: Reject Adoption Ban Bill* (Dec. 21, 2012), <http://www.hrw.org/news/2012/12/21/russia-reject-adoption-ban-bill> (“It’s wrong to make vulnerable children pawns in a cynical act of political retribution.”); Elks & Gutterman, *supra* note 29 (“Critics ... accuse the Kremlin and lawmakers of using particularly vulnerable children as political pawns.”); Laura Jean, *Russia’s Adoption Ban Harms Kids*, CNN (Jan. 17, 2013) (“Children living in orphan institutions need world leaders who do not use them as political pawns, but rather work to protect them. Russia’s adoption ban must be lifted.”).

²⁸² *Supra* at notes 180 - 182, and accompanying text. *C.f.* Susan Alvarado, *Dima Yakovlev Bill, Russian Adoptions, and Dissolutions by Death*, ADOPTION THERAPIST BLOG (Dec. 29, 2012),

expressed discomfort with intercountry adoption generally,²⁸³ due to the imperialist/national pride concerns discussed above.²⁸⁴ Russia of course has the prerogative to define its child welfare system as it pleases, in accordance with the international law principle of the best interests of the child. However on the other hand, it would be wrong to characterize the ban as a simple continuation of a movement away from intercountry adoption – it pertains only to American adoptions, and there are clearly other non-child-centric political factors, both domestic and international, behind the adoption ban.

The Russian President,²⁸⁵ Prime Minister,²⁸⁶ U.S. Ambassador,²⁸⁷ and Children's Ombudsman²⁸⁸ have denied that the Adoption Ban is politically motivated, maintaining an official position that the ban was necessary in light of failed adoptions. The shortcomings and problems relating to those Russia-U.S. adoptions were very recently addressed, by the 2012 Russian-American Agreement.²⁸⁹ However, Russia contends that the Russian-American Agreement had already been proven ineffective. In a January 2013 letter responding to U.S. Senators' concerns over the Adoption Ban, Russia's Foreign Ministry human rights envoy, Konstantin Dolgov, argued that since November 2012, American courts had "regularly" refused to allow Russian consular representatives access to Russian adoptees in America in cases of alleged abuse and neglect, and that the U.S. had thereby "sabotaged" the bilateral treaty²⁹⁰

<http://adoptiontherapist.org/blog/2012/12/29/dima-yakovlev-bill-russian-adoptions-and-dissolutions-by-death> (arguing that if failed adoptions/deaths were "truly the motivation for [the Adoption Ban] Russia most certainly would not have entered into a new negotiation on international adoptions with the U.S. as recently as November 2012 and this ban would have been enacted years ago.").

²⁸³ Igor Rustak, *Russia May Ban All Foreign Adoptions*, RIA Novosti (Jan. 11, 2013) (quoting Russian MP Evgeny Fyodorov: "In fact, [adoptions of Russian orphans by foreign families] is a purchase. None of the civilized countries are involved in slave trade, or sell their children abroad."); Aden, *supra* note 119 (quoting Pavel Astakhov: "It's a natural step for any normal state. The time has come for us to take care of our orphans ourselves.").

²⁸⁴ *Supra* at note 140 and accompanying text.

²⁸⁵ *News Conference of Vladimir Putin*, PRESIDENT OF MOSCOW WEBSITE (Dec. 20, 2012), <http://eng.kremlin.ru/news/4779> ("The issue at hand concerns official liability for these tragedies. People are exempt from criminal liability, and sometimes the judicial system does not even want to consider these cases. That's what bothers Russian legislators, and this is what they are reacting to in the well-known draft [Adoption Ban] that triggered such a reaction.").

²⁸⁶ *Russian Adoption Ban Not Linked to Magnitsky Act – Medvedev*, *supra* note 12 (quoting Prime Minister Medvedev as saying that the Adoption Ban "expresses the concerns of Russia's parliament, the Russian State Duma and the Federation Council, by the fate of our children", and is an "emotional" move that is "neither in fact nor in law" linked to the Magnitsky Act);

²⁸⁷ Young, *supra* note 27 ("Russia's ban of adoptions by U.S. parents was enacted solely with the welfare of Russian children in mind, [Ambassador Kislyak] said this week.").

²⁸⁸ Aden, *supra* note 119 (Pavel Astakhov: "The ban is not an action taken against Americans.").

²⁸⁹ *Supra* at note 192 and accompanying text.

²⁹⁰ Dolgov, *Letter to Senator Landrieu*, *supra* note 179; *see, further*, Natalya Kovalenko, *US Failing to Honor Adoption Agreements – Exclusive Interview with Russian Diplomat*, VOICE OF RUSSIA (Dec. 23, 2012), http://english.ruvr.ru/2012_12_23/US-failing-to-honour-adoption-agreements-exclusive-interview-with-Russian-diplomat/; *Russia Demands Explanations from U.S.*

and ignores its general obligation to allow consular access to Russian citizens²⁹¹ in the U.S.²⁹²

Russia's concern to be apprised of post-adoption situations is understandable, particularly in light of previous instances of appalling abuse and negligence. However, instead of relying on usual consular access rules in relation to adoptees, post-adoption follow-ups and reporting were key issues addressed by the bilateral adoption treaty. The treaty itself does not expressly require Russian access to adoptees post-adoption, although there is a general good faith provision requiring Russian and American authorities to cooperate with one another.²⁹³ Post-adoption reports are to be collected by authorized adoption agencies,²⁹⁴ and parents are to be informed of their obligation to provide access to agency officials for this purpose.²⁹⁵ This cooperative approach, which leaves post-adoption accountability primarily in the hands of the receiving country, had not been fully tested or gauged when Russia announced the ban, and arguably any bumps in its implementation could have been smoothed over with continued negotiation and practice. Given

on a Recent Child Adoption Incident, INTERFAX (Sep. 26, 2012), http://rbth.ru/articles/2012/09/26/russia_demands_explanations_from_us_on_fresh_child_adoption_incident_18586.html (reporting Russia's most recent complaint on lack of consular access post-adoption); *News Conference of Vladimir Putin*, *supra* note 285 (stating that the Adoption Ban was a response to the "fact that when a crime is committed against an adopted Russian child ... Russian representatives are denied any access, even as observers, in these legal processes.").

²⁹¹ Russian adoptees with American parents, in addition to acquiring American citizenship, retain Russian citizenship: Russian-American Agreement, *supra* note 14, art. 13(2).

²⁹² Dolgov, *Letter to Senator Landrieu*, *supra* note 179 ("This contradicts the obligations assumed by the U.S. side under the aforementioned agreement and the 1964 bilateral Russian-U.S. Consular Convention."); *Consular Convention and Protocol*, U.S.-U.S.S.R., Jun. 1, 1964, 19 U.S.T. 5018, art. 12(1) ("A consular officer shall have the right within his district to meet with, communicate with, assist, and advise any national of the sending state and, where necessary, arrange for legal assistance for him. The receiving state shall in no way restrict the access of nationals of the sending state to its consular establishments."). *See, further*, Young, *supra* note 27 ("[Russian Ambassador to the U.S.] Kislyak said Russia considers its adoptees to be Russians with dual Russian-U.S. citizenship, a status that typically entitles a country to have consular access to its citizens when they are on foreign soil."). *Note*: The Vienna Convention on Consular Relations (Apr. 24, 1963, 596 U.N.T.S. 261) requires receiving States to inform sending States "without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor ... who is a national of the sending State" (art. 37(b)), but the provision does not cover cases of abuse/dissolution of Russian adoptees, because "a person who is a U.S. citizen and a national of another country may be treated exclusively as a U.S. citizen when in the United States." (*Consular Notification and Access*, U.S. DEP'T OF STATE (Third Ed., Sep. 2010), at 14). *Note*: In response to Dolgov, U.S. Ambassador Michael McFaul tweeted that the U.S. would continue to honor all international agreements with Russia, including the bilateral consular convention (Michael McFaul, Twitter (Jan. 22, 2013)). This was reported in the Russian media as acknowledgement of a right of unrestricted access by Russian diplomats to adopted children in the U.S. (*U.S. will Honor 1964 Consular Convention on Diplomatic Access to Adopted Children*, RUSSIAN LEGAL INFORMATION AGENCY (Jan. 23, 2013)), although McFaul's statement did not go that far, and nor does the Russian-American Agreement.

²⁹³ Russian-American Agreement, *supra* note 14, art. 4(1).

²⁹⁴ *Id.* art. 5(1)(b).

²⁹⁵ *Id.* art. 5(1)(a).

this, any contention that the ban was a necessary and proportionate measure to protect adoptees is somewhat undermined.

Turning to the political dimensions of the discontinuance, the Adoption Ban was clearly a political reaction to the finger of blame the U.S. pointed at Russia by passing the Magnitsky Act.²⁹⁶ It is important to note who the Adoption Ban law was named for – Chase Harrison. This is significant because the controversy for Russia relating to Chase’s death was not about post-adoption reporting or parental screening (issues addressed by the Russian-American Agreement); rather, Russia took issue with what it saw as leniency towards Miles Harrison due to Chase Harrison’s status as a Russian-born adoptee.²⁹⁷ In this respect, the Adoption Ban is a “tit for tat” response to the Magnitsky Act,²⁹⁸ in which America objected to Russia’s failure to hold anyone accountable for Sergei Magnitsky’s death. Just as Senator John McCain, in introducing the Magnitsky Act, referred to a “culture of impunity” in Russia in relation to human rights,²⁹⁹ so Russia, through the Adoption Ban, has pointed out a culture of impunity in America in relation to the lack of justice for Russian adoptees.³⁰⁰

²⁹⁶ It has been widely portrayed in the media as such – see, e.g., Laurie Penny, *Russia’s Ban on U.S. Adoption Isn’t About Children’s Rights*, THE GUARDIAN (Dec. 28, 2012); Magnitsky Case: Putin Signs Russian Ban on U.S. Adoptions, BBC (Dec. 28, 2012) (“The law is a reaction to the US Magnitsky Act.”); David Herszenhorn, *Russian Adoption Ban Brings Uncertainty and Outrage*, THE NEW YORK TIMES (Dec. 28, 2012) (“The adoption ban ... was included in a broader law retaliating against the United States for an effort to punish Russian human rights violators.”). The U.S. State Department, and a number of members of the Council of Europe, have likewise characterized the ban as politically motivated: Eur. Parl. Ass. Written Declaration, *Intercountry Adoption: Children as Hostages of International Relations*, Doc. No. 13113 (Jan. 29, 2013) (written declaration that the Adoption Ban renders Russian children hostage to transatlantic diplomatic tensions); Richard Solash, *U.S. ‘Regrets,’ NGOs Slam Russian Adoption Ban*, RADIO FREE EUROPE (Dec. 28, 2012), <http://www.rferl.org/content/us-regrets-ngos-slam-russia-adoption-ban/24811326.html> (“State Department spokesman Patrick Ventrell called the Russian move ‘politically motivated’.”).

²⁹⁷ *Supra*, note 10 and accompanying text.

²⁹⁸ *Note*: The Adoption Ban law mirrors the structure and substance of the Magnitsky Act – in addition to prohibiting U.S. adoptions, it “provides for sanctions for those guilty of violating the fundamental human rights and freedoms of Russian citizens”, bans entry for “U.S. citizens involved in such violations”, and allows Russia to “freeze the financial and other assets of U.S. citizens banned from entering its territory” (Press Release, *A Law on Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of Russian Citizens has been Signed*, PRESIDENT OF RUSSIA WEBSITE (Dec. 28, 2012), <http://eng.kremlin.ru/acts/4810>).

²⁹⁹ Jeremy Peters, *U.S. Senate Passes Russian Trade Bill, with a Human Rights Caveat*, THE NEW YORK TIMES (Dec. 6, 2012) (Senator John McCain: “This culture of impunity in Russia has been growing worse and worse.”; response from Russia: “This is an attempt to interfere in our internal affairs, in the authority of Russia’s investigative and judicial organs, which continue to investigate the Magnitsky case.”).

³⁰⁰ See, e.g., *News Conference of Vladimir Putin*, *supra* note 285 (“It is a fact that when a crime is committed against an adopted Russian child, the American justice system often does not react at all and releases the people who have clearly committed a criminal offense against a child, of any criminal responsibility.”); Dolgov, *Letter to Senator Landrieu*, *supra* note 179 (“Recently ... local resident Elizabeth Escalona was sentenced to 99 years in prison for abusing her own daughter, who had to be taken to the intensive care as the result. At the same time, in cases of Russian children Ivan Skorobogatov [Nathaniel Craver, *supra* at note 164 and accompanying text], Ilya Kargyntsev [Isaac Dykstra], Dmitry Yakovlev [Chase Harrison, *supra* at note 10 and accompanying text], who were

There is a further, domestic, political dimension to the discontinuance. President Putin has been accused of adopting “aggressive foreign policy positions [such as the Adoption Ban] to strengthen his own legitimacy in the eyes of Russians.”³⁰¹ Ania Viver has similarly argued that “the public discourse on international adoption has ... served as a tool of Russian domestic policy to strengthen control over Russians and to spread anti-American attitudes.”³⁰² By highlighting the minority of adoptions to America that end tragically, an “outside enemy” is created which is useful in domestic politicking.³⁰³ This promotion of nationalism relates to Russia’s desire to transform its self-presentation, from a country that shamefully exports its children due to an inability to care for them,³⁰⁴ to one which is better able to care for its children than “negligent and abusive” American parents.³⁰⁵

The politicization of child welfare is admittedly troubling, and the Russian Adoption Ban arguably mirrors the politicization of intercountry adoption generally. Intercountry adoption concerns a nation’s ability to care for its most vulnerable, and whether it is culturally, socially and economically appropriate to look to other (more advanced and powerful) nations for support in that task. This strikes at the heart of a nation’s self-presentation, and is a highly emotive issue. International law is accordingly deferential to state determinations of what is in the best interests of children without parents. At the same time, due to confusion about the purpose of intercountry adoption – which is to give children

tortured to death by their U.S. adoptive parents, the perpetrators have not received just punishment.”). *See, further*, Jonathan Earle, *Russians Not Lining Up to Adopt Americans*, THE ST. PETERSBURG TIMES (Jan. 31, 2013) (noting that the Russian Investigative Committee has launched a symbolic criminal case against American parents of abused/deceased Russian adoptees).

³⁰¹ Weir, *supra* note 211.

³⁰² Ania Viver, *Blame Them, Not Us: Adoption as a Political Tool*, FOREIGN POLICY ASSOCIATION (Jan. 31, 2012), <http://foreignpolicyblogs.com/2012/01/31/blame-them-not-us-adoption-as-a-political-tool/>.

³⁰³ *Id.*; *see, further*, Penny, *supra* note 296 (“This is about Russia thumbing its nose at America.”); Altshuler, *supra* note 139 (referring to the Adoption Ban as an “inhuman manifestation of the Anti-West bias”).

³⁰⁴ *See, e.g.*, Anthony D’Amato, *Cross-Country Adoption: A Call to Action*, 73 NOTRE DAME L. REV. 1239, 1245 (1997-1998) (discussing generally the propensity for sending country media to promote a discourse of shame pertaining to intercountry adoption).

³⁰⁵ *See, e.g.*, Aden, *supra* note 119 (quoting Pavel Astakhov: “The time has come for us to take care of our orphans ourselves.”); Fisher, *supra* note 122 (“This view of the world, in which Russia is portrayed as safe and prosperous while life in the U.S. is seen as dangerous and undesirable, just happens to be good for both Putin’s approval and the national self-esteem of millions of Russians, a sort of psychological escape hatch from two decades of stalled development and national humiliation.”); Weir, *supra* note 211 (quoting Irina Bergset, founder of Russian Mothers NGO: “We have a different attitude toward children here in Russia, perhaps due to cultural differences, we don’t treat them like cats and dogs.”); Michael Weiss, *The Anti-Kremlin History of the Man Behind Putin’s Adoption Ban*, THE ATLANTIC (Mar. 11, 2013) (“Astakhov is prickly about the condition of children in Russia, a notorious stain on the country’s modernized self-presentation and the reason that so many orphans have been adopted by overseas parents.”). *See, further*, Earle, *supra* note 300 (noting that in April 2012, Pavel Astakhov “encouraged Russians to get in line to take in American orphans ‘out of principle’”).

families, not to give families children³⁰⁶ – and the resultant commodification of children, there can be untoward political pressure from the demand side of the market on sending countries to continue to “send.”³⁰⁷

B. *A Right to Adoption? Long-term and Short-term Perspectives*

1. Russia’s Long-term Aim: Ending Intercountry Adoption

Despite the obvious political nature of Russia’s American-targeted Adoption Ban, Russia’s rhetoric of moving away from intercountry adoption may also reflect a general belief that the best interests of Russian children are best served by raising them in Russia. The Adoption Ban was accompanied by apparent renewed vigor on the part of the Russian State in promoting and improving domestic adoption programs. On the same day the ban was promulgated, a Presidential decree aimed at improving domestic adoption procedures and efficiency was passed.³⁰⁸ Instructions were issued in January 2013 towards fulfillment of the Decree, requiring various federal ministries to: implement increased assistance for prospective Russian adoptive parents; simplify the adoption procedure; provide post-placement state support; reduce the required number of post-placement reports from adoptive parents to the state; provide tax incentives for adoptive and foster parents; increase pensions to children with disabilities; increase the adoption allowance; and to provide for monthly payments to adoptive and foster parents dependent on the age and disabilities of the child.³⁰⁹ Draft laws were submitted to the Duma on February 26, 2013.³¹⁰ In February, Children’s

³⁰⁶ D’Amato, *supra* note 304, at 1242 (“We don’t give a child to a family; we give a family to a child.”).

³⁰⁷ See, generally, Iusmen, *supra* note 272; Bainham, *supra* note 59, at 225 (noting pressure on Romania to resume international adoption).

³⁰⁸ Ukaz Prezidenta RF “O Nekotorykh Merakh po Realizatsii Gosudarstvennoi Politiki v Sfere Zashchity Detei-Sirot i Detei, Ostavshisya bez Popecheniia Roditelei” [Decree of the President of RF “On certain practices in realization of federal policies in the sphere of protection of children-orphan and children who remained without parental care”], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 28, 2012, No. 1688 (available at <http://graph.document.kremlin.ru/page.aspx?1645431>); see, further, Herszenhorn & Eckholm, *supra* note 76 (reporting President Putin referring to the decree as “changing the procedure of helping orphaned children, children left without parental care, and especially children who are in a disadvantageous situation due to their health problems”).

³⁰⁹ *On Ensuring the Fulfillment of the Presidential Executive Order to Protect Orphans and Children Left Without Parental Care*, GOVERNMENT OF THE RUSSIAN FEDERATION (Jan. 14, 2013), available at <http://government.ru/eng/docs/22372/>.

³¹⁰ *Draft Law on the Facilitation of the Adoption Process in the Russian Federation Submitted to the Duma*, DEPARTMENT OF FEDERAL POLICY IN THE SPHERE OF CHILDREN RIGHTS PROTECTION, Feb. 26, 2013, available at <http://www.usynovite.ru/massmedia/cb289af99e.html>.

Rights Ombudsman Astakhov announced a five to eight year aim of shutting down all orphanages and boarding schools.³¹¹

There are obvious advantages to a long-term strategy of promoting in-country adoption over intercountry adoption. Given the importance of continuity of culture and identity rights,³¹² as recognized by the subsidiarity principle,³¹³ providing appropriate, family-based in-country care is a laudable aim.³¹⁴ Russia's desire to shed the label/role of sending country, with its attendant overtones of imperialism and shame,³¹⁵ is understandable. Russia is also concerned over low fertility rates – halting intercountry adoption could have a positive demographic impact (albeit a minor one).³¹⁶ Finally, a long-term in-country aim could provide the impetus for a change in the general Russian approach to child welfare. As noted above, a large proportion of children in the Russian state system are “social orphans”,³¹⁷ as opposed to “true” orphans with both parents deceased.³¹⁸ Russia should be encouraged to develop positive measures aimed at assisting parents facing substance addictions or poverty so that families can stay together³¹⁹ and pursuing reunification of relinquished children when it is in their best interests.³²⁰ This would provide better protection of parental rights, and the right of the child not to be unduly deprived of his or her family.³²¹ It would also redress ethical

³¹¹ *Most Orphanages to be Closed in Russia, Children to be Adopted*, ITAR-TASS NEWS AGENCY (Feb. 28, 2012), <http://www.itar-tass.com/en/c154/353743.html>.

³¹² See, e.g., UNCRC, *supra* note 69, art. 8 (right to preservation of identity, including nationality); Bainham, *supra* note 59, at 231 (“[I]nternational adoption poses a much more severe threat to the preservation of the child’s identity rights because of the geographical problems of maintaining contact. It also represents a threat to the child’s right to knowledge of his or her cultural, religious and linguistic background”).

³¹³ *Supra* at note 222, and accompanying text.

³¹⁴ This is recognized by the Hague Convention, which recalls that “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family or origin,” and recognizes that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” (emphasis added) (Hague Convention, *supra* note 70, prmb.).

³¹⁵ *Supra* at note 64, and accompanying text.

³¹⁶ Cheryl Weitzstein, *Russia’s Adoption Ban may be Way to Boost Population*, THE WASHINGTON TIMES (Jan. 13, 2013).

³¹⁷ *Supra* note 122, and accompanying text.

³¹⁸ Bainham, *supra* note 59, at n. 3 (“The normal understanding of an orphan is of a child both of whose parents have died.”).

³¹⁹ Declaration of the Rights of the Child, *supra* note 218, princ. 6 (“Payment of State and other assistance towards the maintenance of children of large families is desirable.”); UNCRC, *supra* note 69, art. 27(3)). See, further, Comm. on the Rts. of the Child, Consideration of Reports of the State Parties Under Article 44 of the Convention: Concluding Remarks of the Committee on the Rights of the Child: Italy, U.N. Doc. CRC/C/15/Add.41 (Nov. 27, 1995), cited in King, *supra* note 49, at 457. For a discussion of similar initiatives in the U.S., see King, *supra* note 49, at 465.

³²⁰ See, e.g., Smetanina, *supra* note 126 (noting a draft Ministry of Education law which would make assistance to families in need of work, and treatment for parents with alcohol or drug dependence, without threat of deprivation of parental rights).

³²¹ Russian Family Code, *supra* note 127, art. 54(2) (“Every child shall have the right to live and to be brought up in a family insofar as possible”); Declaration on Adoption, *supra* note 219, art. 3 (“The first priority for a child is to be cared for by his or her own parents.”). See, further, King,

concerns about the propriety of allowing intercountry adoptions to take place for very large sums of money, when smaller upstream sums would have been sufficient to keep children with their birth families.³²²

2. Short-Term Pain: Implications of the Adoption Ban on Russia's Waiting Children

A long-term aim of eradicating the need for intercountry adoption is a legitimate aim. International law places no obligation on states to partake in the institution of international adoption: the Declaration on Adoption expressly states that it “does not impose on states such legal institutions as foster placement or adoption”;³²³ the UNCRC takes an equally permissive approach.³²⁴ The instruments thus embody deference to local cultures and belief systems, some of which prohibit adoption and/or intercountry adoption.³²⁵ Even the Hague Convention, which goes further than previous instruments in promoting intercountry adoption, does not oblige signatories to make children available for adoption³²⁶ (Russia is not, in any event, a party). Further, it is axiomatic that international adoption does not represent a solution to the overall plight of vulnerable children in sending countries, given that international adoptees represent only a very small number of the children without parents in sending countries.³²⁷

In recent years, Russia has increasingly evinced a strong preference for in-country care. As discussed, there are legitimate child-centered and political factors underlying this preference. The Russian government has indicated a desire to close orphanages, and increase the quality and

supra note 49, at 443 (pointing out the unfortunate emphasis in intercountry adoption literature on intercountry adoption over supporting birth families); Bainham, *supra* note 59, at 224 (arguing that the UNCRC and ECHR require countries to “use . . . best endeavors to reunite children with their families, to arrange substitute care where necessary and to stimulate the availability of [domestic] foster parents and domestic adopters.”).

³²² Smolin, *Child Laundering*, *supra* note 53, at 188. This relates to the proportionality of intercountry adoption as a child welfare outcome – see, generally, O’HALLORAN, *supra* note 34, at 62.

³²³ *Supra*, note 224, and accompanying text.

³²⁴ *Supra*, note 225, and accompanying text. *Cc.* Dolgov, *Letter to Senator Landrieu*, *supra* note 179 ([UNCRC’s] provisions do not include any international legal obligations with regard to intercountry adoption of children..”). *C.f.* D’Amato, *supra* note 304, at 1243 (arguing that the UNCRC grants children the right to a family, which requires governments not to “block or impede adoption initiatives in the private sector”. I would argue that, given the potential for corrupt practices to evolve in the absence of state regulation, there is no such duty of restraint).

³²⁵ See, e.g., *Fact Sheet No. 51 – Kafalah*, International Social Service (Dec. 2007), available at <http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheet/eng/50.Kafala%20eng.pdf> (noting that some Islamic schools prohibit international adoption as a matter of Shariah law; “The prohibition of adoption, as a means to create new filiation bonds, is based on an interpretation of two verses of Sura . . . of the Koran and is seen by Sharia law as a falsification of the natural order of society.”).

³²⁶ Bainham, *supra* note 83, at 230.

³²⁷ Bergquist, *supra* note 41, at 349 (internal citation omitted).

quantity of in-country family-based care. As the experience of Romania demonstrates,³²⁸ these are long-term objectives,³²⁹ which will take time. Changing the domestic adoption framework and culture such that the demand for families for these children can be met will also take time.³³⁰ The problem with the Adoption Ban is that it cuts off a significant source of potential adoptive families for currently-institutionalized Russian children *before* sufficient suitable in-country alternatives have been made available.³³¹ This subordinates the best interests of children currently waiting for families to political abstracts and ideals.

It could be argued that the Adoption Ban thus conflicts with Russia's international and domestic³³² obligation to prioritize the best interests of children in all laws pertaining to their protection, including adoption laws.³³³ That is, so the argument would go, while children without parental care do not necessarily have a right to be adopted internationally, Russia, as a participant in intercountry adoption, must make laws and decisions that prioritize the best interests of Russian children,³³⁴ and the Adoption Ban contravenes this obligation. However, such an argument is not well-founded, in light of international law's express deference to states on the question of whether to partake in international adoption. Sara Dillon questions whether this deference continues to be valid, given our understanding of the psychology of institutionalization, and whether international law "adequately addresses the human rights needs of children".³³⁵ She persuasively argues that the UNCRC should include, in a separate protocol, a clear statement against institutional living on human rights grounds.³³⁶ However, as it currently stands, international law remains "undefined on this critical point."³³⁷

³²⁸ See, generally, Bainham, *supra* note 83, at 227-228 (discussing Romanian policies aimed at preventing institutionalization and stimulating domestic policy, and how, after some years, those policies had "begun to bear fruit").

³²⁹ See, also, Bartholet, *Propriety*, *supra* note 48, at 197 ("Solutions lie in reallocating social and economic resources both among countries and within countries, so that more children can be cared for by their birth families. But, given the fact that social reordering on a grand scale is not on the immediate horizon, international adoption clearly can serve the interests of at least those children in need of homes for whom adoptive parents can be found.").

³³⁰ *Id.*

³³¹ See, further, Triseliotis, *supra* note 66, at 131 ("To wait for improved social conditions before acting to give parents and countries a real choice (the choice of adopting) would be tantamount to sacrificing an existing generation of children who need families now.").

³³² KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] (available at <http://www.constitution.ru/en/10003000-03.htm>). art. 38(1) ("Maternity and childhood, and the family shall be protected by the State."); Russian Family Code, *supra* note 127, art. 54(2) ("Every child shall have the right to live and to be brought up in a family insofar as possible."); art. 124(1) (providing for adoption as a "priority form of placement of children who have remained without parental care").

³³³ *Supra* at notes 218, 220.

³³⁴ UNCRC, *supra* note 69, art. 3(1); Declaration on Adoption, *supra* note 219, art. 5.

³³⁵ Dillon, *supra* note 60, at 206, 208.

³³⁶ *Id.* at 255. See, further, *id.* at 235-6 (comparing "the right not to be institutionalized with the right not to be tortured, not of course in the literal sense, but rather in that we can identify common

Nonetheless, the Adoption Ban is at least ethically, if not legally, problematic from the perspective of children presently in institutions who are unlikely to be moved to a family setting in the short-term. There are many times more Russian children eligible for adoption than there are prospective Russian adoptive families.³³⁸ Despite a move towards family/group-based settings,³³⁹ an estimated 100,000 designated orphans remain resident in non-family-based³⁴⁰ institutions. It is almost universally recognized that institutionalization in non-family-based settings is not in the best interests of children, and that family-based care best serves children's physical, mental and emotional needs.³⁴¹ In the long-term, the ban may also be detrimental for certain populations, such as children with special needs, who may never be "adoptable" domestically even in the long-run.³⁴² A blanket rule prohibiting international placements (to America or generally) is too rigid to

negative effects on the human psyche – quite apart from cultural differences – which allow us to articulate an absolute prohibition on such treatment.”).

³³⁷ Dillon, *supra* note 60, at 239 (“The fact that the existing law remains undefined on this critical point tends to transfer discretion to individual countries such that law-making is vulnerable to nationalistic political pressures, particularly in countries with larger numbers of “waiting” children.”).

³³⁸ *Top Court to Issue Adoption Guidelines ‘Within Weeks’*, RIA NOVOSTI (Jan. 18, 2013), <http://en.rian.ru/russia/20130118/178868227/Top-Court-to-Issue-Adoption-Guidelines-Within-Weeks.html> (citing Deputy Prime Minister Olga Golodets – 100,000 children eligible for adoption, but only 18,000 prospective domestic families).

³³⁹ *Supra* at note (132), and accompanying text.

³⁴⁰ Iusmen (*supra* note 272, at 6) rightly points out that “the stigma of ‘institutions’ as referring only to orphanages is misleading. Although orphanages with appalling conditions still exist, international institutions and child rights experts have been promoting the development of ‘institutional care’ providing family-like environment”, which is to say that not all institutional care is the polar opposite of a family setting. See, further, *Pini v Romania*, *supra* note 271, at [153] (the ECtHR noting the “social and family environment” of a foster home in which two adopted Romanian girls has grown up, and where they wished to remain, rather than being adopted to Italy).

³⁴¹ See, e.g., Bartholet, *Where do Black Children Belong?*, *supra* note 48, at 1224; JOHNSON, *supra* note 56, at 151; Dillon, *supra* note 60, at 236-7. Further research is required on the suitability of family-type settings, such as group homes with parental-type care-givers; it is often assumed that permanent family adoption is uniformly preferable to foster/group home settings. In fact, this will depend on a variety of child-specific factors (see, e.g., *Pini v Romania*, *supra* note 271, a case concerning two Romanian girls who were adopted to Italy but expressed a desire to remain in the foster home in which they had grown up). It should also be noted that it appears that a significant number of Russian children adopted to the U.S. end up being cared for in group/foster-home settings, such as the Montana Ranch, which is widely regarded as an excellent provider of specialized care for adoptees with special mental health needs: see Kirk Johnson, *Russian Adoptees Get a Respite on the Range*, THE NEW YORK TIMES (Apr. 26, 2010).

³⁴² Thompson, *supra* note 180, at 707 (noting that Americans have adopted many disabled Russian children, whom “few Russians are willing to adopt”); Herszenhorn, *supra* note 212 (noting that a lawmaker from the United Russia party, which put forward the Adoption Ban, thought there should be an exception to the ban for children with disabilities); Aden, *supra* note 119 (noting the difficulty of finding adoptive parents for children with disabilities in Russia).

accommodate the individual and unique needs of all the children in need of family care.³⁴³

The ban is particularly problematic for Russian children who had already been matched with American parents. Russia requires international adoptive parents to travel to Russia and spend time with their prospective adoptive child once a match has been made, but prior to the final court order.³⁴⁴ Over three hundred Russian children who had met and bonded with their prospective American parents subsequently had their adoptions interrupted by the Adoption Ban.³⁴⁵ In addition to causing great personal hardship to both children and parents, and possibly violating the best interests principle in relation to those individual children, these interruptions arguably constitute a contravention of the ECHR right to family life,³⁴⁶ due to the parent-child bonding that has already taken place. The ECtHR has previously recognized that *intended* family life may be included in the scope of Article 8.³⁴⁷ A number of parents affected by the Adoption Ban are arguing as much before the ECtHR in a pending case.³⁴⁸

3. Moving Forward, Dual Goals: In-country Care and Inter-country Adoption in the Interim

Admittedly, it is sometimes the case that despite the short-term detriment to waiting children and families, moratoriums and bans on intercountry adoption are necessary to address systemic flaws in child protection and the adoption process.³⁴⁹ Such actions are never without

³⁴³ Molly Marx, *Whose Best Interests Does it Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21 EMORY INT'L L. REV. 373, 408 (2007); Carlson, *supra* note 94, at 258.

³⁴⁴ *Supra* note 205. William Pierce notes that this requirement was "implemented because Russian officials were concerned about children in orphanages being "advertised" on internet websites" (William Pierce, *Finding American Homes*, Nat'l Rev. Online (Oct. 24, 2002), at <http://old.nationalreview.com/comment/comment-pierce102402.asp>).

³⁴⁵ *Supra* note 205, and accompanying text.

³⁴⁶ ECHR, *supra* note 267.

³⁴⁷ *Pini v Romania*, *supra* note 271, at [143] (holding, in the case of international adoptive parents matched with Romanian adoptees, that although "Article 8 presupposes the existence of a family...this does not mean, in the Court's opinion, that all *intended family life* falls entirely outside the ambit of Article 8." (emphasis added)).

³⁴⁸ Ponomareva, *supra* note 215 ("The lawyers contend that familial relations between adoptive parents and a child arise when the latter begins to consider them as parents, not after a court decision.").

³⁴⁹ See, e.g., Sara Wallace, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20(3) ARIZONA J. OF INT'L AND COMP. L. 659, 715 (2003) (noting that in 1993, China suspended all international adoptions for ten months, to overhaul procedural requirements in light of concerns over black market adoptions and baby-selling); Maarten Pereboom, *The European Union and International Adoption*, CENTER FOR ADOPTION POLICY (Apr. 28, 2005) (noting that in 2005, in response to EU concerns over child trafficking, Romania banned intercountry adoptions, aiming to "crack down on the corruption that existed in a highly flawed

controversy,³⁵⁰ but may in some cases be the most effective means of cleaning up an intercountry adoption system for the benefit of future participants. However Russia's intercountry adoption system, especially in the wake of bilateral treaties with three major receiving countries, has a positive reputation.³⁵¹ Given this, and given the availability of the Hague Convention and/or bilateral treaties to regulate and improve the intercountry adoption process, there is no long-term payoff or rationale for a premature ban on intercountry adoptions from Russia, much less an American-specific ban.

Some opponents of intercountry adoption have argued that the practice discourages in-country initiatives aimed at reducing abandonment, and promoting adoption.³⁵² Pavel Astakhov has argued that the Adoption Ban will force Russia to "take care of our orphans ourselves", by "burning the bridge" to America.³⁵³ Other supporters of the ban have argued it will attract public attention to the issue of Russian orphans and increase domestic adoptions.³⁵⁴ Certainly, more research on the impact of intercountry adoption on domestic child welfare systems is needed. However, as Sara Dillon points out, "expressing commitment to investment in long-term solutions to the problem of abandonment has no logical corollary in disregarding the immediate matter of children presently in institutions."³⁵⁵ In the long-term, Elizabeth Bartholet argues that it is "unlikely that adoption of a relatively small number of ... homeless children will interfere with efforts to assist those other children who remain in their native countries."³⁵⁶ On the contrary, "foreign adoption may "increase awareness in ... receiving countries of the problems of children in the sending countries" and thus create a more sympathetic international climate."³⁵⁷ In contrast, in the wake of the Adoption Ban, Russia stands to incur widespread international criticism

system").); Lisa Yemm, *International Adoption and the "Best Interests" of the Child: Reality and Reactionism in Romania and Guatemala*, 9 WASH. U. GLOBAL STUD. L. REV. 555, 571 (2010) (outlining the U.S.-imposed moratorium on adoptions from Guatemala due to non-compliance with the Hague Convention); Iusmen, *supra* note 272, at 8-9 (on the reasons behind Romania's moratorium); Dillon, *supra* note 60, at 244-252 (discussing moratoriums on adoptions from Cambodia, Vietnam, Romania and Guatemala).

³⁵⁰ See, e.g., Wechsler, *supra* note 59, at 3 ("[Romania's] prohibition is not in the best interest of Romania's many children living in institutions, but rather is a self-serving political policy enacted in an attempt to gain European Union membership."); Marx, *supra* note 343.

³⁵¹ *Supra*, note 149, and accompanying text.

³⁵² *Supra*, note 84, and accompanying text.

³⁵³ Aden, *supra* note 119.

³⁵⁴ *Russian Government Drafts Fresh Bill Facilitating Domestic Adoptions*, RT (Feb. 26, 2013), <http://rt.com/politics/russian-government-drafts-fresh-bill-facilitating-domestic-adoptions-459/>.

³⁵⁵ Dillon, *supra* note 60, at 196.

³⁵⁶ Bartholet, *Propriety*, *supra* note 48, at 198 (referring to intercountry adoption globally).

³⁵⁷ *Id.*

and condemnation for subordinating the immediate interests of her children to long-term and/or political objectives.³⁵⁸

In light of the forgoing, Russia should be encouraged to reconsider the Adoption Ban, and to pursue the dual goals of (i) eradicating the need for intercountry adoption, and (ii) in the interim, allowing intercountry adoption (including to the U.S.) to continue, in accordance with the subsidiarity principle, where it can best serve the welfare needs of children without families. In relation to the former goal, Russia should pay particular attention to positive “upstream” measures aimed at keeping families together and pursuing reunification, within the best interests framework, in addition to existing initiatives aimed at improving in-country foster care and adoption prospects. Regarding the latter goal, the U.S. and Russia could engage in negotiations, within the bilateral treaty framework, on how to address Russian concerns with consular/state access to Russian children adopted in America, particularly in cases of alleged abuse or neglect. These actions are not inconsistent with a longer-term objective of reducing the need for intercountry adoption. More generally, Russia should consider ratifying the Hague Convention, or completing as a matter of priority bilateral adoption treaties with other countries that receive Russian adoptees, in order to better safeguard children and families.

Intercountry adoption should continue to be a last-resort possibility wherever it serves the welfare needs of Russian children, for so long as the demand for families outstrips domestic supply. Of course, in encouraging Russia to reconsider the Adoption Ban, care must be taken to ensure that it is the interests of Russian children without parents, not American parents without children, that guide the discussion.³⁵⁹ It is also important that any assumptions about the suitability or otherwise of in-country alternatives to intercountry adoption (such as family-style group homes and foster care) are based, as far as possible, on social science evidence³⁶⁰ and a case-by-case assessment of each child’s best

³⁵⁸ Catherine Bitzan, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT’L L. 121, 143 (2008) (arguing, in relation to South Korea’s adoption policies, that “acting preemptively [to ban intercountry adoption] may raise a host of new troubles for which the country may be even more widely criticized”). See, further, Will Englund & Tara Bahrapour, *Russia’s Ban on U.S. Adoptions Devastates American Families*, The Washington Post (Dec. 28, 2012, 10:00 AM) (“Senior members of the Russian cabinet had warned against the bill, saying that it ... unavoidably draw[s] attention to the sorry state of Russian orphanages.”). For examples of criticism of the Adoption Ban, see *supra* at notes 212 and 213 (Washington) and note 296 (Council of Europe and U.S. State Department).

³⁵⁹ See Bainham, *supra* note 59, at 225 (asking, in relation to the Romanian moratorium on intercountry adoption, whether “the enthusiasm for restarting the practice [is] about meeting the needs of childless adults outside Romania, or ... about providing for Romanian families and their children?”).

³⁶⁰ See, generally, Dillon, *supra* note 60, at 192 (contending that only social science evidence can assist in determining to what extent the UNCRC is flawed due to its failure to clarify the standard of care that meets a human rights standard); and at 193-4 (noting that “the inquiry into

interests.³⁶¹ As Russian authorities attempt to make such assessments, adoption to the U.S. should continue to be one of a range of options open to Russian children without families.

CONCLUSION

There is a Russian saying that “everyone sees the world from his own bell tower.”³⁶² This Article has attempted to put forward the view from the Russian bell tower on intercountry adoption. It is not an attempt to apologize for the Russian ban on adoptions to American “forever families,” or to highlight the plight of Americans seeking to adopt from Russia.³⁶³ In the immediate context, with thousands of Russian children institutionalized, many of whom had already been matched, and bonded, with American parents, the ban subordinates the “best interests” principle to political considerations. The Adoption Ban represents a political reaction to a finger of blame (justifiably) pointed at Russia by the U.S., and is a reflection of the political nature of intercountry adoption generally. Beneath the “tit for tat” that the Adoption Ban embodies there may be genuine concerns about post-adoption care in America. These concerns inspired the Russian-American Adoption Agreement, which was heralded with great optimism on both sides. Although the agreement had not yet been fully rolled out, and although Russia apparently had continued concerns over post-adoption cooperation at the level of the U.S. states, these concerns could no doubt have been addressed with further negotiations and collaboration.

Intercountry adoption is frequently presented as a self-evidently logical solution to the demand for children in receiving countries, and the ready supply of family-less children in sending countries.³⁶⁴ This is a short-sighted perspective, which understates the understandable desire of states to move towards caring for their children domestically, and the

whether an orphanage can provide an adequate form of protection for children in HR terms has little to do with the important, though separate, debate on cultural relativity and HR generally.”); at 236 (noting the lack of empirical evidence as to what extent group family-style homes work as well as a family);

³⁶¹ See, e.g., *Pini v Romania*, *supra* note 271 (ECtHR noting the “social and family environment” of a foster home in which two adopted Romanian girls had grown up, and where they wished to remain). See, further, King, *supra* note 49 (arguing that intercountry adoption should be reformed to ensure children are not removed from “what they would describe as family”).

³⁶² Thomas Ware, *The Other Side of the Hill*, PARAMETERS 32, 32 (1977), <http://www.carlisle.army.mil/usawc/parameters/Articles/1977/ware.pdf>.

³⁶³ See, generally, Perry, *supra* note 111, at 106 (noting the over-emphasis in intercountry adoption literature on the perspective of would-be adoptive parents).

³⁶⁴ See, e.g., Wallace, *supra* note 349, at 723 (“The practice of international adoption does appear to be a logical solution to this disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt in others.”); Marx, *supra* note 343, at 373 (“The obvious solution to this global problem is a convergence of supply and demand, creating families for children and children for families.”).

need to comply with child and parental rights by ensuring that wherever possible children remain with their birth parents.³⁶⁵ Russia's aim of ultimately providing suitable in-country care for her children is a laudable one, with which receiving countries such as the U.S. can no doubt identify. As holders of *parens patriae* duties, states understandably are, and should be, concerned with providing, and being seen as able to provide, for the welfare of their most vulnerable populations. There is no obligation to partake in intercountry adoption *per se*. But an in-country welfare system will take time to develop, and a ban on adoptions to the U.S., historically a very significant receiver of Russian children, harms the best interests of children currently institutionalized who are unlikely to be moved to a family setting in the short-term. In the long-term, an intercountry adoption ban may also be problematic for certain populations, such as children with disabilities, who are less likely to be adopted or fostered domestically. A more appropriate and proportionate means of achieving in-country welfare, and ensuring that the subsidiarity principle and best interests principle are respected, is to vigorously reinvent the domestic welfare system, as Russia has shown signs of doing, but to retain intercountry adoption as a measure of last resort. Russia should be encouraged in its endeavors to improve in-country child welfare systems, and to consider reopening adoptions to America, at minimum as an interim, last resort option wherever it serves the best interests of the child in question.

³⁶⁵ C.f. Marx, *supra* note 343, at 376 (“Although the problems of children without families and families without children are distinct, one practice can solve them both: [international adoption].”). It is by no means a truism that “international adoptions are beneficial to all parties involved” (c.f. Marx at 380).